

INDIAN CONTRACT

AND

SPECIFIC RELIEF ACTS,

WITH A COMMENTARY, CRITICAL AND EXPLANATORY.

BY

THE RIGHT HONOURABLE

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PREFACE TO THE FOURTH EDITION.

THE only material additions to the commentary on the Contract Act are on dealing with enemies (s. 23) and 'frustration of adventure' by war conditions (s. 56).

It has been thought desirable in the present edition to add a concise commentary on the Specific Relief Act (I of 1877). I have not attempted to conceal my opinion that this Act is sadly inferior to the Contract Act as a work of art, an opinion formed many years ago and now confirmed by closer examination. To some extent the faults are accounted for by unhappy imitation of the Draft Civil Code of New York. The sound judicial traditions of the High Courts have sufficed, however, to prevent the loose and inaccurate expressions derived from this undesirable source, or copied out of old-fashioned text-books, from doing much harm in practice. In dealing with the English authorities I have endeavoured to separate the matters of principle on which they are really instructive, and may be properly cited from the merely local details of questions arising out of the provisions of the Statute of Frauds or the peculiar methods of English conveyancing. Indiscriminate use of imperfectly understood English precedents is one of the greatest dangers to which Indian jurisprudence is exposed, and the danger will be there so long as artificial inducements are held out to Indian students to learn so much and only so much English law as will satisfy the requirements of the Inns of Court for call to the English Bar; an amount better than none, it may be granted, for an English lawyer, but rather worse than none for an Indian practising in India.

Very brief comment has been thought sufficient for those parts of the Act which are not specially concerned with contracts.

The entire work of indexing and correcting the press has been done by Mr. J. H. Vakeel, of the Inner Temple.

F. P.

LINCOLN'S INN;

August, 1919.

PREFACE TO THE FIRST EDITION.

THE Indian Contract Act is in effect, and for the reasons explained in our commentary on the first section, a code of English law. Like all codes based on an existing authoritative doctrine, it assumes a certain knowledge of the principles and habits of thought which are embodied in that doctrine. But, unlike European codes, it has to be applied in practice by magistrates and pleaders to whom the materials and surroundings of its own system are unfamiliar. It seems proper, therefore, that editors of an Anglo-Indian Code should give a pretty full exposition of those fundamental notions in the Common Law which are concisely declared, with or without modification, by the text. How far they have in fact been modified, and whether by deliberate design or by accident in the execution, is a question of interpretation depending not on the text alone, but on its relations to the English authorities which the framers of the code had before them, and to the subsequent development of English law. My first object has been to make those relations as clear as possible. For this purpose I have given more elementary explanation than would be required in a treatise addressed only to English lawyers or to practitioners in the High Courts, while I have endeavoured to avoid entering on details of procedure and other purely English technical matters beyond what was necessary for understanding the substance of the authorities.

We also have by this time a considerable number of reported Indian decisions on the Act. As it did not seem to me possible for an English lawyer who had not practised in India to deal adequately with these, I consented to undertake this edition only on the terms of the Indian cases being collected and digested by a competent person within the jurisdiction. Accordingly this task was entrusted to Mr. D. F. Mulla, who has performed it, so far as I can judge, completely and faithfully. I do not profess to have verified all his references, but I have verified and considered enough of them to be satisfied that his work is trustworthy. With the form of it I have interfered as little as might be, though some rearrangement and recasting was needful in order to

combine Mr. Mulla's portion with my own in continuous whole. The result is that Mr. Mulla, while he is answerable for the inclusion of all Indian reported cases which ought to be cited for the use of practitioners, is not necessarily answerable for the distribution of them as appropriate to this or that section, or for the opinions expressed. At the same time I have seldom found occasion to differ with Mr. Mulla. Much oftener I have been able to strengthen his conclusions by the analogy of recent English doctrine, and to state them with increased confidence.

The present commentary is critical as well as explanatory. The criticism unavoidably follows the Act section by section, and is therefore broken up into many comments on details. In order to give a general notion beforehand of the causes which have made it necessary, and the spirit, I trust no captious one, in which it was undertaken, I now repeat the words I used in an unsigned review of Dr. Whitley Stokes's "Anglo-Indian Codes" on the publication of the first volume in 1887 :—"Every written law which goes beyond mere regulation of details is a work of art ; it can no more afford to dispense with unity of design and continuity of execution than a monumental building. It should proceed from one mind, or from very few minds working in intimate association, and it should be framed, if not by one hand, at least under uniform general direction and by hands trained in one school. Where these conditions cannot be satisfied in the first instance, the next best thing is to secure a certain measure of uniformity by careful authoritative revision in the final stage. In England even this is seldom attainable. . . . The Government of India is less hampered, though not quite so free as might be supposed, and it may be said to have made good progress in founding a school of legislative composition. The results obtained are, on the whole, worthy of the succession of distinguished men whose services in the Governor-General's Council are commemorated by Mr. Whitley Stokes ; and we must add that no small share of the labour and the credit belongs to Mr. Stokes himself. Still there has been in some cases a want of continuity. Measures long held in suspense, perhaps by excessive scruples, have been finished and passed in something like haste. Not only the work of different hands, but work done from quite different points of view, has been pieced together with an incongruous effect."

Another source of unequal workmanship, and sometimes of positive error, is that the framers of the Indian Codes, and of the Contract Act in particular, were tempted to borrow a section here and a section there from the draft Civil Code of New York, an inflection which the sounder lawyers of that State have been happily successful so far in averting from its citizens. This code is in our opinion, and we believe in that of most competent lawyers who have examined it, about the worst piece of codification ever produced. It is constantly defective and inaccurate, both in apprehending the rules of law which it purports to define and in expressing the draftsman's more or less satisfactory understanding of them. The clauses on fraud and misrepresentation in contracts—which are rather worse, if anything, than the average badness of the whole—were most unfortunately adopted in the Indian Contract Act. Whenever this Act is revised everything taken from Mr. Dudley Field's code should be struck out and the sections carefully recast after independent examination of the best authorities." In fact, the Contract Act passed through not less than three distinct stages. First, there was the draft prepared in England by the Indian Law Commission, uniform in style and possessing great merit as an elementary statement of the combined effect of common law and equity doctrine as understood about forty years ago. By the courtesy of the India Office I have had the use of this draft, and it is often referred to in the commentary for comparison with the final text of the Act. Next, this was revised and in parts elaborated by the Legislative Department in India. The borrowing from the New York draft Code seems to belong to this phase. Lastly, Sir James Stephen made or supervised the final revision, and added the introductory definitions, which are in a wholly different style and not altogether in harmony with the body of the work. Evidently this process could not satisfy the conditions of a model code. It is much to the credit of the workmen that the result, after allowing for all drawbacks, was a generally sound and useful one.

In many of the arguments and some of the judgments in the reports of the Indian High Courts there appears, if I mistake not, a tendency to follow English authorities too literally (though in any case they are not positively binding on Indian Courts), considering only what the Courts actually decided in England, and not what they

would have decided if their office had been to apply the principles of the Common Laws to the facts of Indian society. The best way to counteract such a tendency is not to neglect the letter of English judgments, which is not practicable and would not be useful, but to enter more fully into their spirit and distinguish their permanent from their local and accidental elements. To this object I have endeavoured, within the bounds of my undertaking, to contribute.

P.

LINCOLN'S INN,
May, 1905.

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ADDENDA.

- Page. Sec.
- 133, 21. The second illustration to s. 21 has been repealed by the Repealing and Amending Act 24 of 1917, Sch. II.
- 166, 23. *Trading with Enemy* :- The fullest account of the law as to the effect of war on contractual relations with reprints of British and American Leading Cases, will be found in Trotter (William Finlayson), *The Law of Contract during and after War*, 3rd Edition, London and Edinburgh, 1919.
- 581, 133. The word "debtor" was added after "the principal" by the Repealing and Amending Act 24 of 1917, Sch. I.

THE SPECIFIC RELIEF ACT.

(ACT No. I OF 1887.)

S. R. A.
S. 1.

[7th February, 1877.]

An Act to define and amend the law relating to certain kinds of Specific Relief.

WHEREAS it is expedient to define and amend the law relating to certain kinds of specific relief obtainable in civil suits; It is hereby enacted as follows :—

PART I.

PRELIMINARY.

1. This Act may be called the Specific Relief Act,
Short title. 1877 (a) :

(a) For Statement of Objects and Reasons, see Gazette of India, 1875, Pt. V, p. 258; for Report of the Select Committee, see *ibid*, 1876, Pt. V, p. 1445; for discussions in Council, see *ibid*, 1875, Supplement, pp. 981 and 1025; *ibid*, 1876, Supplement, p. 1284, and *ibid*, 1877, Supplement, p. 177.

Act I of 1877 has been declared in force in Upper Burma generally (except the Shan States) by the Burma Laws Act, 1898 (XIII of 1898), s. 4 (1), Burma Code, Ed. 1899.

It has been extended, by notification under s. 5 of the Scheduled Districts Act, 1874, to the following Scheduled Districts, namely :

The Scheduled Districts of the Punjab,
including at the time districts which
now form the North-West Frontier
Province

Gazette of India, 1877, Pt. I, p. 562 ;

the Districts of Kamrup, Naugong,
Darrang, Sihsagar, Lakhimpur, Goal-
para (excluding the Eastern Duars),
Sylhet, and Kachar (excluding the
North Kachar Hills)

ib., 1877, Pt. I, p. 662 ;

the Districts of Hazari'bagh, Lohardaga
(including the present district of
Palamau, separated in 1894) and
Manbhum and Pargana Dhalbhum
in the District of Singhbhum [the
Lohardaga District is now called the
Ranchi District, see Calcutta Gazette,
1899, Pt. I, p. 44]

ib., 1878, Pt. I, p. 82 ;

S. R. A.
Ss. 1-3.

It extends to the whole of British India, except the Scheduled Districts as defined in Act No. XIV of 1874.

Local extent.

And it shall come into force on the first day of May, 1877.

Commencement.

2. [*Repeal of enactments.*] *Rep., Act XII of 1891.*

3. In this Act, unless there be something repugnant in the subject or context,—

Interpretation.
clause.

“obligation” includes every duty enforceable by law :

“trust” includes every species of express, implied or constructive fiduciary ownership :

“trustee” includes every person holding, expressly, by implication or constructively, a fiduciary character :

Illustrations.

(a) Z. bequeaths land to A., “not doubting that he will pay thereout an annuity of Rs. 1,000 to B. for his life.” A. accepts the bequest. A. is a trustee, within the meaning of this Act, for B., to the extent of the annuity.

(b) A. is the legal, medical or spiritual adviser of B. By availing himself of his situation as such adviser, A. gains some pecuniary advantage

the Scheduled Districts of the Central

| | | |
|--|---------|--|
| Provinces | | Gazette of India, 1879, Pt. I, p. 772 ; |
| Sind | | <i>ib.</i> , 1880, Pt. I, p. 676 ; |
| Coorg | | <i>ib.</i> , 1882, Pt. I, p. 217 ; |
| Western Jalpaiguri | | <i>ib.</i> , 1882, Pt. I, p. 511 ; |
| that portion of the Jalpaiguri District, known as the Western Duars | | <i>ib.</i> , 1896, Pt. I, p. 44 ; |
| Kumaon and Garhwal and the Tarai | | |
| Parganas | | <i>ib.</i> , 1886, Pt. I, p. 452, and 1895, Pt. I, p. 573. |
| Ajmere and Merwara | | <i>ib.</i> , 1897, Pt. I, p. 1415. |

S. 9 has been extended, by notification under s. 5 of the Scheduled Districts Act, 1874, to the Taluqs of Bhadrachalam and Rakapilli and the Rampa Country [Gazette of India, 1879, Pt. I, p. 630] ; to the scheduled portion of the Mirzapur District, *see* Gazette of India, 1886, Pt. I, p. 452. Section 9 has also been extended, by notification under the same Act, to tracts in the Godavari Agency to which it had not already been extended, *see* Gazette of India, 1900, Pt. I, p. 59.

S. 9 has been declared in force in British Baluchistan by the British Baluchistan Laws Regulation, 1890 (I of 1890), s. 3, Baluchistan Code, Ed. 1900, p. 60.

S. R. A.
S. 3.

which might otherwise have accrued to B. A. is a trustee, for B., within the meaning of this Act, of such advantage.

(c) A., being B.'s banker, discloses for his own purpose the state of B.'s account. A. is a trustee, within the meaning of this Act, for B., of the benefit gained by him by means of such disclosure.

(d) A., the mortgagee of certain leaseholds, renews the lease in his own name. A. is a trustee, within the meaning of this Act, of the renewed lease, for those interested in the original lease.

(e) A., one of several partners, is employed to purchase goods for the firm. A. unknown to his co-partners, supplies them, at the market-price, with goods previously bought by himself when the price was lower, and thus makes a considerable profit. A. is a trustee, for his co-partners, within the meaning of this Act, of the profits so made.

(f) A., the manager of B.'s indigo-factory, becomes agent for C., a vendor of indigo-seed, and receives, without B.'s assent commission on the seed purchased from C. for the factory. A. is a trustee, within the meaning of this Act, for B., of the commission so received.

(g) A. buys certain land with notice that B. has already contracted to buy it. A. is a trustee, within the meaning of this Act, for B., of the land so bought.

(h) A. buys land from B. having notice that C. is in occupation of the land. A. omits to make any inquiry as to the nature of C.'s interest therein. A. is a trustee, within the meaning of this Act, for C., to the extent of that interest.

"Settlement" means any instrument (other than a will or codicil as defined by the Indian Succession Act)

(b) whereby the destination or devolution of successive interests in movable or immovable property is disposed of or is agreed to be disposed of :

and all words occurring in this Act, which are defined in the Indian Contract Act, 1872, (c) shall be deemed to have the meanings respectively assigned to them by that Act.

Words defined
in Contract Act.

Obligation, etc.—If obligation and enforceable duty are to be synonymous, why use the longer word, which is also the less accurate? In Roman Law "obligation" is confined to duties between definite persons; in old English law it was confined to one special kind of instrument; modern scientific writers for the most part use it in the Roman sense. Such, however, is the definition.

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With regard to "trust" it will be observed that the Trusts Act (II of 1882) was passed some years later. In that Act the "constructive trust" of English books is called an obligation in the nature of a trust; so that, as a matter of verbal definition, the expressions "trust" and "trustee" are wider in the Specific Relief Act. From an English point of view it would be easy to criticize the language of the illustrations in one or two places; thus on illustration (h) it might be observed that in English law a mere trespasser who has taken possession without any colour of title has a perfectly real though an unlawful interest. But such criticism would not be profitable for Indian purposes.

The illustrations are intended to explain the extent of the definitions, not to state cases necessarily falling within any section of the Act. Thus illustrations (e) and (f), so far as regards the legal result of the facts, would come under the Contract Act: see ss. 216, 218, 258.

Express, implied or constructive trust.—Trusts, according to English law, are either (1) express or (2) constructive or implied. An express trust is one which is created by the actual terms of some instrument or declaration. A constructive or implied trust arises when property, not impressed for the time being with any express trust, is acquired or held by a person in circumstances which render it obligatory upon him to hold it for the benefit of some other person as beneficiary (*d*). The expressions 'express trust', 'implied trust', and 'constructive trust' are not used in the Indian Trusts Act, 1882. What are called express trusts in English law are called merely 'trusts' (defined in s. 3), and are dealt with in ss. 4 to 79, while what are called constructive or implied trusts in English law are called "obligations in the nature of trusts," and are dealt with in ss. 80 to 96. The Indian Trusts Act may thus be divided into two parts, one dealing with the express trusts of the English law and the other with the constructive or implied trusts of that law.

III. (a).—This is an instance of what is known in the English law as precatory trust. A precatory trust is one created by precatory words, such as expressions of confidence, request, or desire that

property will or shall be applied for the benefit of certain named individuals. For another instance, see the Indian Trusts Act, 1882, s. 6, ill. (a). S. R. A.
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III. (b).—Compare Indian Trusts Act, 1882, s. 88.

III. (d).—The case of a mortgagee renewing a lease is now dealt with in the Transfer of Property Act, 1882, s. 64, and the Indian Trusts Act, 1882, s. 90.

III. (g).—The case of A. buying land with notice that B. has already contracted to buy it is now dealt with in the Indian Trusts Act, 1882, s. 91, and the Transfer of Property Act, 1882, s. 40 [of which see ill. (a)]. In such a case A. stands in the position of a trustee for B. of the land purchased by him, and he could not profit by the conveyance to him except to stand in the shoes of his vendor and receive the purchase from B., on payment of which he would have to convey the land to B. (e). See also s. 27, clause (b), below, and the second illustration to clause (b).

A. agrees to sell certain land to B., and puts him in possession under the agreement. B. is ready and willing to complete the purchase and take a registered conveyance from A. Before any conveyance is executed, A. sues B. for possession of the land. According to a Full Bench of the Madras High Court, A. is entitled to possession, the reason given being that under s. 54 of the Transfer of Property Act, 1882, an agreement for sale of immovable property does not of itself create any interest in or charge on such property and that the provisions of the section are imperative (f). On the other hand, it has been held by a Full Bench of the Bombay High Court (g), that A. is not entitled to possession. According to that Court s. 54 of the Transfer of Property Act does not exhaust the relations which flow from a contract for sale of immovable property according to the Indian Statute Law, and A. stands in a fiduciary relation to B. having regard to the provisions of s. 40 of that Act, s. 91 of the Indian Trusts Act, and s. 3 of the Specific Relief Act read with ill. (g) thereto. Scott, C.J., said "Where a vendor who has contracted to sell

(e) *Gangaram v. Lazman* (1916) 40 Bom. 498. Bapireddi (1906) 29 Mad. 336 [F. B.]

(g) *Bapu Apaji v. Kashinath Sadob*

(f) *Kurri Veerareddi v. Kurri* (1917) 41 Bom. 438 [F. B.]

S. R. A. *immovable property and has under the contract put the prospective*
Ss. 3-5. *vendee in possession, sues the latter in ejectment, he repudiates, if the vendee is willing to complete the purchase, the fiduciary obligation arising out of the contract and annexed to the ownership of the property, and seeks to treat the vendee as a trespasser. Once it is recognised that the plaintiff is violating his fiduciary obligation, it is clear that the Court cannot grant him the relief which he seeks, for it will not aid him in committing a breach of trust and his suit must fail; the defendant is no trespasser, but is in possession under the contract which the plaintiff has bound himself to carry out."*

4. Except where it is herein otherwise expressly enacted, nothing in this Act shall be deemed—
 Savings.

(a) to give any right to relief in respect of any agreement which is not a contract;

(b) to deprive any person of any right to relief other than specific performance, which he may have under any contract; or

(c) to affect the operation of the Indian Registration Act on documents.

Clause (a).—The expression 'agreement' is defined in the Indian Contract Act, 1872, s. 2, cl. (e), and 'contract' in s. 10 of the same Act. See the last paragraph of s. 3 above.

Clause (c).—A. executes a writing whereby he agrees to grant a lease of his land to B. for a period of five years. A. delivers possession of the land to B. under the agreement, but the writing is not registered. A. sues B. for specific performance. The writing, not being registered, is not admissible in evidence, and A.'s suit must be dismissed. See Registration Act, 1908, s. 2 (7), s. 17 (1) (d), and s. 49 (c).

Specific relief how given.

5. Specific relief is given—

(a) by taking possession of certain property and delivering it to a claimant;

- (b) by ordering a party to do the very act which he is under an obligation to do ; S. R. A
ss. 5-7.
- (c) by preventing a party from doing that which he is under an obligation not to do ;
- (d) by determining and declaring the rights of parties otherwise than by an award of compensation ; or
- (e) by appointing a receiver.

Clause (a).—See ss. 8-11.

Clause (b).—See ss. 12-30.

Clause (c).—See ss. 53-57.

Clause (d).—See ss. 42-43.

Clause (e).—See s. 41.

See notes to s. 7, below.

6. Specific relief granted under clause Preventive relief. (c) of section 5 is called preventive relief (h).

See notes to s. 7, below.

7. Specific relief cannot be granted for the mere purpose of enforcing a penal law. Relief not granted
to enforce penal
law.

Note on sections 5-7.—These sections are in the nature of abundant preliminary explanation or caution, and cannot affect the construction of the detailed provisions which follow in their proper places ; the contents of the Act set out at the head are a better guide to those provisions. Whitley Stokes pointed out long ago that s. 5 is really of no use. S. 7 is a negative statement of the principle more clearly expressed by saying that, specific relief being a civil remedy, the plaintiff must show some individual right to it in every case, claiming either performance of what is due to him or repression of wrong committed or threatened against him in particular.

(h) See ss. 53-57.

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Se. 7-9.

What is enforcing penal law.—To direct a Magistrate to furnish copies of the proceedings in a case before him to the unsuccessful prosecutor does not amount to granting specific relief to enforce a penal law. Such a direction, therefore, is not against the provisions of this section (i).

PART II.

OF SPECIFIC RELIEF.

CHAPTER I.

OF RECOVERING POSSESSION OF PROPERTY.

(a) *Possession of Immovable Property.*

8. A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure (j).

In the manner prescribed by the Code of Civil Procedure—that is to say, by a suit for ejectment on the basis of title (k).

9. If (l) any person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit * * * (m), recover possession thereof, notwithstanding any other title that may be set up in such suit.

Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.

(i) *Bank of Bengal v. Dinonath Roy* (XVI of 1887), s. 51, Punjab Code, Ed. 1903, p. 201.
(1882) 8 Cal. 166.

(j) Act V of 1908.

(k) *Lachman v. Shambhu Narain* (1911) 33 All. 174, 180 [F.B.].

(l) But see as to tenancies in the Punjab, the Punjab Tenancy Act, 1887

(m) The words “instituted within six months from the date of dispossession” were repealed by the Repealing and Amending Act, 1891 (XII of 1891).

No suit under this section shall be brought against the Government. S. B. A
S. 9.

No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

Restitution of dispossessed holder.—This section affirms an important principle of substantive law. Disputed rights are to be decided by due process of law and not otherwise, and existing peaceable possession will be protected against disturbance without regard to the question of its origin (*n*). The only way to do this with effect is to restore the dispossessed holder, without prejudice to the ultimate rights of any adverse claimants, including the dispossessor himself. Those rights, however, must be asserted in a court of justice and the question of title dealt with in regular course. Inasmuch as dispossession is commonly a notorious and easily proved fact, and matters of title involving legal argument cannot be dealt with in a suit under this section, the decision in such a suit is not subject to appeal.

The distinction between summary or comparatively summary process for the protection of possessor and litigation for the final settlement of titles between contending claimants is familiar in English law and goes back to the Middle ages, although there is now no formal difference in the procedure. It does not necessarily involve the doctrine, fully worked out in England only in our time, that possession itself has all the incidents of title as against all men who have not a better right. We cannot undertake to develop that proposition here. The present writer has endeavoured elsewhere² to state it with as little technical detail as possible (*o*).

English law permits though it does not encourage a person who is actually entitled to the possession of immovable property (not one who erroneously, however honestly and plausibly, thinks himself entitled) and is out of possession to re-enter without breach of the peace if he can. This concession to self-help was inevitable in days when the

(*n*) See *Glenwood Lumber Co. v. prudence*, 4th ed. 1918, pp. 183-188.
Phillips [1904] A. C. 405, 410. See *Perry v. Clissold* [1907] A. C. 73.

(*o*) Pollock, *First Book of Juris.*

S. R. A. superior courts were closed for great part of the year and twenty
S. 9. miles were counted a long day's journey. Such cases are not now frequent though not wholly unknown (*p*); we do not think it useful to make further reference to them here, still less to the peculiar and difficult questions raised on the medieval statutory prohibition of forcible entry.

Possession, Title and Evidence.—The Act assumes the general rules of law concerning possession to be known; whether because the draftsman supposed them to be simple and obvious, or because he knew them to be so much otherwise that any attempt at definition in a short compass would be perilous, it skills not to inquire. The most we can do here is to recall a few of the elementary principles which are material to be borne in mind in practice.

Possession in fact is manifested by the exercise of such exclusive control as the object is capable of. It need not always be complete or immediate visible control; in the case of wild uncleared land payment of taxes may be sufficient evidence of possession, as being the only practicable act of dominion (*q*), and where a continuous parcel of land is held under one and the same claim of title, acts of control or enjoyment done in one part of it are relevant to show possession of the whole (*r*).

The Common Law generally attributes possession in law to the person exercising control in fact on his own account, whether for a greater or a lesser interest, provided that the control is intended to be exclusive (*s*). The only practical exception is where the custodian is acting merely on behalf of a person whose orders he is bound to obey. Such a custodian is called a servant or bailiff in law, whether answering or not answering that description in popular language. This is hardly a real exception.

(*p*) *Lous v. Telford* [1876] 1 App. Ca. 414.

(*q*) *Kirby v. Couderoy* [1912] A. C. 599.

(*r*) The classical authority is Parko B.'s judgment in *Jones v. Williams* (1837) 2 M. & W. 326, 46 R. R. 611, approved, *Lord Advocate v. Blantyre*

(1879) 4 App. Ca. 770, 791.

(*s*) Otherwise in Roman law; therefore comparison of the Common Law with Roman or Romanized learning should be undertaken only by first-hand students of the Roman authorities, and even by them with special caution.

It is a rare but possible case that possession is in dispute between claimants of whom neither can be said to possess in fact; in such case it is a very ancient rule that possession follows title, that is the law attributes possession to the claimant whose title is the better. This applies to both immovable and movable property (t).

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Limitation.—A suit under this section should be brought within 6 months from the date when the dispossession occurs (Limitation Act, Art. 3).

Object of the section.—This section corresponds with s. 15 of the Indian Limitation Act 14 of 1859 (u). The object is to discourage people from taking the law into their own hands, however good their title may be (v). The section was enacted to prevent persons ousting a man from possession except by process of law. It provides a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised (w).

Scope of the section.—Section 8 of the Act provides that a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the Code of Civil Procedure, that is to say, by a suit for ejectment *on the basis of title*. Sec. 9 gives a summary remedy to a person who has without his consent been dispossessed of immovable property otherwise than in due course of law, for recovery of possession *without establishing title*, provided that his suit is brought within six months of the date of dispossession. The second paragraph of the section provides that the person against whom a decree may be passed under the first paragraph may, notwithstanding such decree, sue to establish his title and to recover possession. The two sections give alternative and distinct remedies. If a suit is brought under section 9 for recovery of possession, no question of title can be raised or determined. The object of the section is clearly to discourage forcible dispossession and to enable

(t) *Ramsay v. Margrett* [1894] 2 Q. B. 18, 27.

(u) As to cases decided under that section, see *Broughton's Code of Civil Procedure*, 1859, pp. 572-573.

(v) *Krishnarav v. Vasudev* (1884) 8 Bom. 371, 375; *Rudrappa v. Narasingrao* (1905) 29 Bom. 213.

(w) *Wali Ahmed v. Ajudhia Kandu* (1891) 13 All. 537, 553, 562.

- S. R. A.** the person dispossessed to recover possession by merely proving
S. 9. previous possession and wrongful dispossession without proving title, but that is not his only remedy. He may, if he so chooses, bring a suit for possession on the basis of his title (x).

Failure to prove title in a suit for possession based on title.—When a plaintiff sues for possession on the basis of title and fails to establish title, he is not entitled to a decree for possession under the first paragraph of this section even if he can prove possession within six months anterior to his dispossession (y).

Where a suit which is really one based upon title is dealt with by the Court of first instance as a suit under this section, and an appeal is preferred from the decree, the appellate Court should send the suit back to the Court of first instance to be dealt with as a suit based upon title (z).

Who may sue under this section.—It is only a person who has had 'juridical' possession that may sue under this section. Therefore, a trespasser who has been dispossessed is not entitled to sue under this section (a). For the same reason a person claiming that he was in possession "as representing his father and his uncle" cannot sue under this section (b). Though a tenant may hold over after the expiry of the period of tenancy, his possession is still juridical, and he is entitled to sue his landlord for possession under this section, if forcibly dispossessed by him (c). When a tenant is dispossessed by a third person, he is the proper party to sue under this section (d). But if the tenancy has terminated after the date of dispossession, the landlord may sue under this section (e).

Who may be sued under this section.—A, alleging that B. and C. dispossessed him of certain land, sues them for possession under this section. B. alleges that the land belongs to D. and that

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| (x) <i>Lachman v. Shambhu Narain</i> | <i>Ashrub Ali</i> (1904) 31 Cal. 647, at p. 656. |
| (1911) 33 All. 174, 180 [F. B.]. | (b) <i>Nritlo Lall v. Rajendro Narain</i> |
| (y) <i>Lachman v. Shambhu Narain</i> | <i>Deb</i> (1895) 22 Cal. 562. |
| (1911) 33 All. 174; <i>Ramasami v. Paraman</i> (1902) 25 Mad. 448. | (c) <i>Rudrappa v. Narsingrao</i> (1905) 29 Bom. 213. |
| (z) <i>Naraindas v. Het Singh</i> (1918) 40 All. 637. | (d) <i>Virjivandas v. Mahomed Ali Khan</i> (1881) 5 Bom. 208, 211-12. |
| (a) <i>Amiruddin v. Mahamad</i> (1891) 15 Bom. 685. But see <i>Tamizuddin v.</i> | (e) <i>Jagannatha v. Rama Rayer</i> (1905) 28 Mad. 238. |

he is D.'s manager. C. alleges that he is the lessee of the land under D. The suit is properly brought against B. and C., they being the persons who, A. alleges, dispossessed him. D. is not a necessary party to the suit (f).

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"Dispossessed."—The mere cutting of a couple of bundles of grass does not necessarily amount to dispossession within the meaning of this section (g), nor can A. be said to be dispossessed by B., if B. prevails upon A.'s tenants not to pay the rent to A., and receives the rent himself (h).

Immovable property.—There is a conflict of decisions as to whether the expression "immovable property" in this section includes incorporeal rights, *e.g.*, a right to fish in a khal the soil of which does not belong to the person claiming the right. The High Courts of Bombay (i) and Madras (j) have held that it does. On the other hand, it has been held by a Full Bench of the Calcutta High Court that it does not (k). According to the latter Court, the expression "immovable property" in this section refers only to such properties of which physical possession can be given as contemplated by s. 5, cl. (a), of this Act.

"Otherwise than in due course of law."—A person is said to be dispossessed "otherwise than in due course of law," if he is dispossessed by another acting of his own authority and without the intervention of a Court of law. The words "due course of law" are not merely equivalent to the word "legally," for a thing which is perfectly legal may still be by no means a thing done "in due course of law." The expression "due course of law" means the regular, normal process and effect of the law operating on a matter which has been laid before it for adjudication. Thus though a landlord

(f) *Virjivandas v. Mahomed Ali* of way).

Khan (1881) 5 Bom. 208, 214, 217.

(g) *Virjivandas v. Mahomed Ali Khan* (1881) 5 Bom. 208, 221; nor, it would seem, for any purpose.

(h) *Jarini Mohun v. Gunga Prasad* (1887) 14 Cal. 649.

(i) *Bhundal v. Pandol* (1888) 12 Bom. 221 (right of fishery); *Mangaldas v. Jewanram* (1899) 23 Bom. 673 (right

(j) *Krishna v. Akilanda* (1890) 13

Mad. 54 (right of ferry).

(k) *Fadu Jhala v. Gour Mohun Jhala* (1892) 19 Cal. 544 [F. B.]; *Natabar v. Kubir* (1891) 18 Cal. 80 (right of fishery); *Fuzkur Rahman v. Krishna Parsad* (1902) 29 Cal. 614 (hat, possession whereof is held by collecting tolls or rents).

S. R. A. is entitled to possession of his land from his tenant after the
S. 9. expiry of the period of tenancy, yet if the tenant holds over, he may not dispossess him of *his own authority*. If he does so, it is competent to the tenant to sue the landlord for possession under this section (l).

“Notwithstanding any other title that may be set up in such suit.”—If the suit is brought within the prescribed period, that is, within 6 months from the date of dispossession, even the rightful owner is precluded from showing his title to the land (m). It is not a defence to a suit under this section—

- (i) by a mortgagee against the mortgagor, that the mortgage and possession under it were obtained by the mortgagee by fraud (n);
- (ii) by a tenant against the landlord, that the tenant was holding over at the date of dispossession (o).

Order under Criminal Procedure Code, s. 145.—In proceedings instituted under s. 145 of the Criminal Procedure Code it is found by the Criminal Court that B. and not A. was in possession of certain land, and an order is made under that section declaring B. to be entitled to retain possession thereof until evicted therefrom in due course of law. The order is no bar to a suit by A. against B. for possession under the present section. It is a mistake to suppose that after such an order A.'s only remedy is to institute a suit to have his title declared and possession given to him (p).

Limits of decree under this section.—A decree under this section should be confined to directing delivery of possession to the plaintiff. The Court has no power under this section to direct the defendant to pay to the plaintiff the cost of removing huts and filling up excavations (q).

(l) *Rudrappa v. Narsingrao* (1905) 446.

20 Bom. 213.

(m) *Enactoolah v. Kishen Soondar*

(1867) 8 W. R. 386, 389; *Ismail Ariff*

v. Mahomed Ghous (1893) 20 Cal. 834,

842-843, 20 I. A. 99, 106-107.

(n) *Sayaji v. Ramji* (1881) 5 Bom.

(o) *Rudrappa v. Narsingrao* (1905)

29 Bom. 213.

(p) *Jwala v. Ganga Prasad* (1908)

30 All. 331.

(q) *Tilak Chandra v. Fatik Chandra*

(1898) 25 Cal. 803.

Suit brought more than 6 months after dispossession.—If a suit is brought under this section within 6 months from the date of dispossession, all that the plaintiff has to prove to entitle him to a decree is previous possession; he has neither to allege nor prove title. If the suit is not brought until after 6 months from the date of dispossession, the plaintiff cannot recover on the strength merely of his previous possession; he can recover only if he proves his title to the land (r). But what if the suit is one for possession against a *trespasser*, that is, one who has no title to the land? Is it necessary in such a case for the plaintiff to succeed that he should prove his title, or is it sufficient if he proves his previous possession? On this point there is a conflict of decisions between the High Courts of Bombay, Allahabad, and Madras on the one hand, and the High Court of Calcutta on the other hand. According to the Bombay (s), Allahabad (t), and Madras (u) High Courts, the plaintiff is entitled to succeed if he proves his previous possession; it is not necessary for him either to allege or prove his title. According to the Calcutta decisions, the plaintiff is not entitled to succeed if he merely proves his previous possession: for the plaintiff to succeed he should allege and prove his title, at the least possessory title, i.e., possession for twelve years (v). The distinction between the two conflicting views may be explained by an illustration: A., alleging that he had been in quiet and undisturbed possession of certain land for eleven years and six months and that he was forcibly ousted from possession by B. who never had any title to the land at all, sues B., 8 months after the date of dispossession, for possession. A. has no title to the land at all, but it is proved that he had been in possession as alleged. B. also has no title of any kind to the land (w). Is A. entitled to a decree? According to the Bombay, Allahabad and Madras decisions, he is. These Courts proceed upon the principle of English Law also recognized in India (x) that possession is a good

S. B.
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(r) *Wise v. Amerrunissa* (1880) 7 I. A. 73, 80-81.

(s) *Krishnarav v. Vasudev* (1884) 8 Bom. 371.

(t) *Wali Ahmed v. Ajudhia Kandu* (1891) 13 All. 537; *Umrao Singh v. Ramji Das* (1914) 36 All. 51.

(u) *Narayan Row v. Dharmachar* (1903) 26 Mad. 514.

(v) *Niva Chand v. Kanachiram* (1899) 26 Cal. 579; *Debi Churn v. Issur Chunder* (1882) 9 Cal. 39; *Ertaza Hossein v. Bany Mistry* (1882) 9 Cal. 130; *Purmeswar v. Brij Lal* (1890) 17 Cal. 256.

(w) See (1891) 13 All. 537, 539, and *Limitation Act*, Art. 142.

(x) *Penraj v. Narayan* (1882) 6 Bom. 215, 223; *Sunder v. Parbati*

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§s. 9, 10.

title against all but the true owner and entitles the possessor to maintain ejectment against any other person than such owner who dispossesses, and they hold that this principle is not in any way affected by the provisions of the present section. According to the Calcutta High Court, A.'s possession being for a period less than 12 years, he is not entitled to possession, though B. has no title. According to that Court the only case in which a plaintiff having no title can succeed against a trespasser on the strength of his previous title is that provided for by the present section, and that unless the suit is brought within 6 months from the date of dispossession, he is not entitled to any relief. We are inclined to think that the correct view is the one taken by the Bombay, Allahabad, and Madras High Courts in accordance with English doctrine as now settled, and that the present section cannot be held to take away any remedy available to a party on the strength of his previous possession.

Non-occupancy raiyat.—A non-occupancy raiyat, who has been dispossessed from his holding, may bring a possessory action under this section within 6 months from the date of dispossession, or he may bring an action upon title in which case the suit may be brought either within 6 or 12 years as provided for in art. 120 or art. 142 of the Limitation Act. It is a mistake to suppose that he has no right or title to his land, and that the only remedy open to him is that provided by the present section. He has a title to the land, his title being that of a tenant to the land (y).

Appeal.—The term "suit" in this section includes a proceeding in execution of a decree passed in a suit under this section; no appeal therefore lies from an order made in execution proceedings (z).

(b) *Possession of Movable Property.*

10. A person entitled to the possession of specific movable property may recover the same in the manner prescribed by the Code of Civil Procedure.

Recovery of
specific movable
property.

(1889) 12 All. 51, 56, 16 I. A. 186, 193; (y) *Tamizuddin v. Ashrub* (1904)
Ismail Ariff v. Mahomed Ghous (1893) 31 Cal. 647 [F. B.]
20 Cal. 834, 842-843, 20 I. A. 99, 106, (z) *Kanai Lal v. Jatindra Nath*
107. (1918) 45 Cal. 519.

Explanation 1.—A trustee may sue under this section for the possession of property to the beneficial interest in which the person for whom he is trustee is entitled. S. 10
S. 1

Explanation 2.—A special or temporary right to the present possession of property is sufficient to support a suit under this section.

Illustrations.

(a) A. bequeaths land to B. for his life, with remainder to C. A. dies. B. enters on the land, but C., without B.'s consent, obtains possession of the title-deeds. B. may recover them from C. [Common learning in England.]

(b) A. pledges certain jewels to B. to secure a loan. B. disposes of them before he is entitled to do so. A., without having paid or tendered the amount of the loan, sues B. for possession of the jewels. The suit should be dismissed, as A. is not entitled to their possession, whatever right he may have to secure their safe custody. [See *Donald v. Sackling* (1866) L. R. 1 Q. B. 585.]

(c) A. receives a letter addressed to him by B. B. gets back the letter without A.'s consent. A. has such a property therein as entitles him to recover it from B. [*Oliver v. Oliver* (1861) 11 C. B. N. S. 139, 132 R. R. 505.]

(d) A. deposits books and papers for safe custody with B. B. loses them and C. finds them, but refuses to deliver them to B. when demanded. B. may recover them from C., subject to C.'s right, if any, under Section 168 of the Indian Contract Act, 1872.

(e) A., a warehouse-keeper, is charged with the delivery of certain goods to Z., which B. takes out of A.'s possession. A. may sue B. for the goods.

Illustrations to the section.—It will be observed that the foregoing illustrations are illustrations in the strictest sense, examples of the various cases to which the procedure can be applied. So far as they state or involve propositions of substantive law those propositions have no special connexion with the Act.

As to ills. (d) and (e), see Contract Act, 1872, s. 160, p. 656 above.

Recovery of specific movable property.—Ss. 10 and 11 embody the English rules as to detinue. An action in detinue would only lie for some *specific* article of movable property capable of being recovered in specie and of being seized and delivered up to the winning party (a).

(a) *Fadu Jhala v. Gour Mohan Jhala v. Jotharam* (1899) 22 Mad. 478, 480 (1892) 19 Cal. 544, 566, 571; *Murugesu*

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11. Any person having the possession or control of particular articles of movable property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession, in any of the following cases:—

Liability of person in possession, not as owner, to deliver to person entitled to immediate possession.

- (a) when the thing claimed is held by the defendant as the agent or trustee of the claimant;
- (b) when compensation in money would not afford the claimant adequate relief for the loss of the thing claimed;
- (c) when it would be extremely difficult to ascertain the actual damage caused by its loss;
- (d) when the possession of the thing claimed has been wrongfully transferred from the claimant.

Illustrations.

of clause (a)—

A, proceeding to Europe, leaves his furniture in charge of B, as his agent during his absence. B., without A.'s authority, pledges the furniture to C., and C., knowing that B. had no right to pledge the furniture, (b) advertises it for sale. C. may be compelled to deliver the furniture to A., for he holds it as A.'s trustee.

[Here it is not material whether the furniture has, 'any peculiar or intrinsic value' or not: *Wood v. Rowcliffe* (1844) 3 Hare 304, (1847) 2 Ph. 383, 64 R. R. 303.]

of clause (b)—

Z. has got possession of an idol belonging to A.'s family, and of which A. is the proper custodian. Z. may be compelled to deliver the idol to A.

[*Cp. Fry on Specific Performance*, §§ 79-82.]

of clause (c)—

A. is entitled to a picture by a dead painter and a pair of rare China vases. B. has possession of them. The articles are of too special a character to bear an ascertainable market-value. B. may be compelled to deliver them to A.

[The China vases are derived from *Fahke v. Gray* (1850) 4 Drew. 651, 113 R. R. 493. Whether the painter is alive or dead seems immaterial.]

(b) If C. were acting in good faith Contract Act.
he would be protected by s. 178 of the

Restitution of Chattels.—It is hard to see on principle why the right should be confined to special categories. The framers of the Act seem to have forgotten that the Indian Courts are not merely Courts of English equitable jurisdiction. In England a person entitled to the immediate possession of a specific chattel was in principle entitled to recover it by an action of detinue. The writ in that action demanded specific delivery. But owing to the defective procedure for the execution of common-law judgments, this could not in practice be enforced. Then a court of equity, when applied to for relief, had to be satisfied that the remedy in damages to the value of the goods, which alone was available for the plaintiff at common law, would not be adequate, or that some specially equitable right of the plaintiff's, under a trust for example, was involved. Under a more rationally developed system the burden would be on the defendant to show cause why it should not be just and equitable to award specific restitution.

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Possession.—A plaintiff is not entitled to a decree under this section unless he alleges and proves that the defendant is in possession (c).

Execution.—As to the execution of a decree for specific movable property, see the Code of Civil Procedure, 1908, O. 21, r. 31.

CHAPTER II.

OF THE SPECIFIC PERFORMANCE OF CONTRACTS.

Introduction to Chapter II.—The jurisdiction of the English Court of Chancery to decree specific performance of contracts was founded, as we have already said, on the want of an adequate remedy at law. If the conception of equitable remedies had been maintained with logical strictness, the Court would have held itself bound to examine each individual case with an open mind before deciding whether an extraordinary remedy was called for. But after the Court of Chancery was recognized as a regular and ordinary Court it was impossible to affect such an attitude, and it became the settled rule that in certain classes of cases the nature of the case itself was ground enough for the Court's interference.

(c) *Penkatasubha Rao v. The Asiatic S. N. Co.* (1916) 39 Mad. 1, 10-11 [F.B.]

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Presumption as to contracts to convey land.—Accordingly we find that a contract for the sale or letting of land is presumed to be a fit subject-matter for the exercise of the jurisdiction we are now considering. It is said indeed that the remedy of specific performance is discretionary: the residual amount of truth in this at the present day is that the plaintiff must show himself actively willing to perform his part of the contract, and that some defences are dismissible which are not or under the older practice were not admitted in an action at common law for damages (*d*). None the less the broad result, in the modern doctrine of courts of equity, is that specific performance is a normal remedy in suits on contracts for the sale or letting of land, but is awarded on contracts of other species only when exceptional circumstances make it proper to do so. One reason why this doctrine does not in general extend to a sale of goods is that regularly a complete contract for the sale of ascertained goods transfers the property at once to the buyer, who thereupon has all the ordinary legal rights and remedies of an owner: see s. 78 of the principal Act and the commentary thereon, p. 458 above. Another and more extensive one is that where the goods are of a kind purchasable in the market, whether the contract is for specific goods or not, compensation in money is an adequate remedy; the successful plaintiff can, if he chooses, employ the damages awarded to him in buying goods equivalent to those contracted for.

Further it was held that if the vendor of property was compellable in a Court of Equity to perform his contract, he must also be entitled to come to the Court, though merely seeking payment of his purchase-money; this was commonly accounted for as being required by the principle of "mutuality" "in order to give a right corresponding with that which is given to a purchaser" (*e*).

Treatment of the subject in English books.—The literature of specific performance has been swelled, in England, with much matter that really belongs to the general law of contract; the reason being that Courts of Equity were little concerned, at least until very recent

(*d*) *Cp. Pollock, Law of Fraud in Direct London & Portsmouth Rly. Co. British India*, pp. 124-128. (1852) 1 D. M. & G. at p. 528, 91 R. R.

(*e*) See Lord Cranworth in *Webb v.* at p. 157.

times, with matters of current commercial business, and equity practitioners regarded only those species of contracts which usually occurred in dealings with land and with trust estates. Instead, therefore, of assuming as a matter of course that there were general and known conditions for the validity of any contract, and a plaintiff claiming specific performance must first show that those elementary conditions were satisfied, they expected the text-writer who provided for their particular convenience to explain all that a plaintiff in a specific performance suit had to prove, as if there were no other kinds of contracts in the world. Part III of Sir Edward Fry's classical treatise is entitled "Defence to the Action" and covers nearly 400 pages. It may be said without much hesitation that from two-thirds to three quarters of its contents are concerned merely with the general law of contracts as understood in courts of equity. One may add that many rules and principles which were supposed to be mysteries of equity have now turned out to be very good common law. But, as Sir Edward Fry said in the preface of his first edition sixty years ago, the text-writer had to consider what a lawyer—that is, a practising lawyer in the old Court of Chancery—would expect to find in his book.

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Treatment in British Indian Law.—In India we are free from these anomalies. The substantive rules determining the existence of a valid contract are laid down in the Contract Act, and explained and further illustrated in their places in the foregoing commentary; it will therefore be sufficient to refer to the appropriate sections of the Contract Act, so far as convenient, for matters which are presumed by the rules more particularly relating to specific performance, but are not part of them. One could wish however that the Specific Relief Act had not in many places adopted the language of old-fashioned English books.

Moreover the doctrine of the English Courts relating strictly to the remedy of specific performance has been purposely simplified in India, and further (though not yet enough) lightened by the suppression of technical subtleties and difficulties created partly by the Statute of Frauds and partly by the artificial methods of reasoning to which the Court of Chancery resorted to defend or enlarge its jurisdiction. A certain number of Indian practising lawyers have

S. R. A. had to read of these technicalities in English books (f); the best thing
 ss. 11, 12. they can do is to forget them as thoroughly as possible for Indian purposes.

(a) *Contracts which may be specifically enforced.*

12. Except as otherwise provided in this Chapter the
Cases in which specific performance is enforceable. specific performance of any contract may in the discretion of the Court be enforced—

- (a) when the act agreed to be done is in the performance, wholly or partly, of a trust;
- (b) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done;
- (c) when the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief; or
- (d) when it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.

Illustrations—

of clause (a)—

A. holds certain stock in trust for B. A. wrongfully disposes of the stock. The law creates an obligation on A. to restore the same quantity of stock to B., and B. may enforce specific performance of this obligation (g).

(f) A concise and rational view of the English doctrine in its English form may be found in F. W. Maitland, *Equity and the Forms of Action*, Camb. 1909, Lect. 19.

(g) This illustration is repealed wherever the Indian Trusts Act, 1882, is in force, see Act II of 1882, ss. 1 and 2.

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of clause (b)—

A. agrees to buy, and B. agrees to sell, a picture by a dead painter and two rare China vases. A. may compel B. specifically to perform this contract, for there is no standard for ascertaining the actual damage which would be caused by its non-performance.

[The China vases are suggested by *Falcke v. Gray* (1859) 4 Drew. 651, 113 R. R. 493.]

of clause (c)—

A. contracts with B. to sell him a house for Rs. 1,000. B. is entitled to a decree directing A. to convey the house to him, he paying the purchase-money.

In consideration of being released from certain obligations imposed on it by its Act of Incorporation, a railway company contract with Z. to make an archway through their railway to connect lands of Z. served by the railway, to construct a road between certain specified points, to pay a certain annual sum towards the maintenance of this road, and also to construct a siding and a wharf as specified in the contract. Z. is entitled to have this contract specifically enforced, for his interest in its performance cannot be adequately compensated for by money; and the Court may appoint a proper person to superintend the construction of the archway, road, siding and wharf.

[See *Storer v. G. W. R. Co.* (1842) 2 Y. & C. C. C. 48, 60 R. R. 23.]

A. contracts to sell, and B. contracts to buy, a certain number of railway-shares of a particular description. A. refuses to complete the sale. B. may compel A. specifically to perform this agreement, for the shares are limited in number and not always to be had in the market, and their possession carries with it the status of a shareholder, which cannot otherwise be procured.

[See Commentary below.]

A. contracts with B. to paint a picture for B., who agrees to pay therefor Rs. 1,000. The picture is painted. B. is entitled to have it delivered to him on payment or tender of the Rs. 1,000.

of clause (d)—

A. transfers without endorsement, but for valuable consideration, a promissory note to B. A. becomes insolvent, and C. is appointed his assignee. B. may compel C. to endorse the note, for C. has succeeded to A.'s liabilities and a decree for pecuniary compensation for not endorsing the note would be fruitless.

[Involved in *Watkins v. Maule* (1820) 2 J. & W. 242. There the assignee's indorsement was voluntary, and the Court answered an objection to its validity by saying that he was not only entitled but bound to indorse.]

Immovable property.—The wording of this section bears the marks of the peculiar English history. In a rational order the explanation, which is really the most important operative part of

- S. R. A.** the enactment, would come first, and we should be told in a more direct manner that in a suit to enforce a contract to transfer immovable property the Court (the contract being otherwise good and enforceable) will grant specific performance unless special reason to the contrary appears, but for breach of other kinds of contracts only when special reason for it is shown.
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Movable goods.—A contract to deliver specific goods will be enforced by way of specific performance if they are “articles of unusual beauty, rarity and distinction” (Kindersley, V.C., in *Falcke v. Gray*) (*h*), or of special value to the party suing by reason of personal or family associations or the like. The principle is not confined to cases of contract, and indeed the illustrations of it most commonly quoted are furnished by decisions in which contract was not an element at all (*i*). It may be that in a contested case where specific performance is sought the dispute between the parties is only as to what is included in the contract; the decision in such a case is really an authority only on the points of construction which were in dispute (*j*). In fact we do not often meet with claims to specific performance of a contract to sell and deliver goods in modern practice. As lately as 1909, in Canada, specific performance was sought (in an action turning mainly on questions of construction) of a continuing contract by a Coal Company to deliver coal of a specified quality to steel works: this part of the claim was somewhat summarily dismissed by the Judicial Committee (*k*). It was not alleged that coal of the special quality which the steel-working Company contracted for, and on which they had a right to insist, could not be obtained elsewhere. Justice, therefore, was done by holding the steel Company entitled to rescind the contract and to be compensated in damages for loss already incurred. Whether a contract to deliver something produced on the seller’s land and not elsewhere can be specifically enforced is a question which, so far as known to the present writer, has not occurred for decision.

(*h*) 4 Drew. at p. 658, 113 R. R. at p. 496. by the cubic foot; the sellers wanted the buyers to take all they had offered,

(*i*) Fry on Specific Performance, § 79. the buyers to take less. Evidently

(*j*) Thus in *Thorn v. Comms. of Works* (1863) 32 Beav. 490, 138 R. R. 838; the subject matter of the contract was stone from a disused bridge, sold

there was no question of artistic or historical value.

(*k*) *Dominion Coal Co. v. Dominion Iron & Steel Co.* [1909] A. C. 293.

The Court will, if necessary, enforce the specific execution of provisions made by agreement between partners dissolving partnership as to the separate ownership of trade books or the like which were partnership property. No question could be raised at this day about the jurisdiction (*l*). Such a division of property is not a sale, but the principle applicable is the same in substance: the objects are of little or no value except to the party entitled, and to him they have a value for which there is no definite measure. We do not speak here of the right to restrain disclosure of trade secrets, which is a different matter.

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As to sale of other kinds of property.—Specific performance of a contract to sell a share in a partnership business may be enforced (*m*). It is easy to see that an award of damages in such a case would be merely speculative. The right to be admitted a partner by nomination under a power conferred by the partnership agreement has some similar incidents but is not of the same class (*n*).

Sales of stocks or shares.—A contract to sell Government stock, or any stock for which there is a regular market, is not a proper subject for specific performance, for the same reason that a contract to sell and deliver ordinary marketable goods is not. But this does not apply to the transfer of shares in companies for which there is not a notorious market (*o*). It is to be observed that in such cases the Court has no administrative difficulties to face, as it only has to order the seller to execute the proper transfer and do whatever is necessary on his part to authenticate it by registration. The jurisdiction is analogous to that which deals, as we have just noticed, with the transfer of a share in a private partnership. As for the details of such transaction, they belong to the special law of companies, and depend largely on local usage.

Agreements to lend money.—See notes to s. 21, cl. (a), p. 896 below

(*l*) *Lingen v. Simpson* (1824) 1 Sim. & St. 600. The report does not look as if the point was really thought arguable.

(*m*) *Dodson v. Downey* [1901] 2 Ch. 620: no dispute as to the jurisdiction, the only question argued and decided being on the purchaser's duty to indemnify the vendor.

(*n*) See p. 814 above.

(*o*) *Duncuft v. Albrecht* (1841) 12 Sim. 46, 56 R. R. 46, appears to be the earliest authority. It would hardly be followed now so far as it assumes railway shares not to be marketable. Consolidated stock representing original share or loan capital was at that time unknown.

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Contracts to execute building or other works.—It is not a convenient course to decree specific performance of a contract such that the execution of the work contracted for would necessarily be prolonged, and the work of a kind which a court of justice has not the means of supervising. Therefore it has long been the rule in England that the Court will not usually grant this remedy on a contract for building or engineering work. But there are special circumstances which will induce the Court to make an exception. In one important class of cases a purchaser of land has covenanted, as part of the consideration on his side, to build or execute specified works on that land. Such an undertaking will be enforced if the following conditions are satisfied: (1) the work to be done must be defined with sufficient exactness for the Court to know what it is requiring to be performed; (2) the party seeking performance must have a substantial interest of such a nature that damages would not be an adequate compensation; (3) the defendant has by the contract obtained possession of land on which the work is contracted to be done (*p*). The law has been so clearly laid down by the Court of Appeal to the effect just stated that it is of little use even in England to go back to the older authorities (*q*).

Further specification and illustration of cases in which specific performance is not granted will be found in s. 21 below.

“Discretion of the Court.”—See notes to s. 22 below.

Decree for specific performance.—As to execution of decrees for specific performance and decrees for the execution of a document, see Code of Civil Procedure, 1908, O. 31, rr. 32, 34.

Suit to obtain the benefit of a lost deed.—Where a writing that has been executed is lost, the proper course of proceeding is not by a suit requiring the defendant to execute a fresh writing, but by a suit to restore the terms of the lost writing. In an Allahabad case, Stuart, C.J., observed that there was no doubt that such a suit could be instituted in this country (*r*).

(*p*) Romer, L.J., in *Wolverhampton Corporation v. Emmons* [1901] 515, 525.

(*q*) See Kekewich, J.'s remarks in *Molynaux v. Richard* [1906] 1 Ch. 34, 40. This was the case of a covenant in

an ordinary English building lease to build houses of a kind specified by reference to similar works already done.

(*r*) *Maya Ram v. Prag Dat* (1882) 5 All. 44, 52.

13. Notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance.

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S. 12

Contracts of which the subject has partially ceased to exist.

Illustrations.

(a) A. contracts to sell a house to B. for a lakh of rupees. The day after the contract is made, the house is destroyed by a cyclone. B. may be compelled to perform his part of the contract by paying the purchase-money.

[*Paine v. Weller* (1801) 6 Ves. 349.]

(b) In consideration of a sum of money payable by B. A. contracts to grant an annuity to B. for B.'s life. The day after the contract has been made, B. is thrown from his horse and killed. B.'s representative may be compelled to pay the purchase-money.

[*Mortimer v. Caffer* (1782) 1 Bro. C. C. 156 (*).]

Notwithstanding anything contained in s. 56 of the Contract Act.—This section appears to have been thought necessary by reason of the very wide language used in the section of the Contract Act referred to. It would perhaps have been superfluous if the second paragraph of I. C. A., s. 56, had read, with greater exactness, “a promise to do an act which, after the contract is made, becomes impossible,” etc. The effect of such an event on the other party's obligations and on the agreement as a whole cannot be disposed of in a universal proposition. Still the paragraph in question, if read with reasonable regard to the general intention and to the illustrations, does not affirm any such general proposition as the Specific Relief Act denies.

Illustrations.—That which the illustrations really illustrate is the rule that as soon as a contract of sale is concluded, the buyer, unless it is expressly agreed otherwise, takes as between the parties all the rights and likewise the risks of an owner. From that moment he is entitled to the benefit of an increase in the value of the object, however caused, and must bear likewise any casual loss or depreciation. As to goods, see p. 484 above. The rule is quite plain without any

(a) In this case the accident was intentional or not, is immaterial. drowning: the variation, whether in-

S. R. A. talk of possibility or impossibility, and it is unfortunate that the words were introduced in this connexion.

Illustration (a) assumes that a contract for the sale of a house does, of itself, transfer the beneficial interest in the house to the purchaser, and make him owner in equity in the English phrase. This was also the law here before the Transfer of Property Act, 1882, came into force. By s. 54 of that Act it is provided that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. By s. 55 (5) it is enacted that the risk of destruction is borne by the purchaser only from the date when the ownership passes to him, and the ownership appears to pass on execution of a proper conveyance by the vendor [see s. 55 (1) (d)]. It would, therefore, seem that the illustration cannot now be applied where the Transfer of Property Act is in force.

14. Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed bears only a small proportion to the whole in value, and admits of compensation in money, the Court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award compensation in money for the deficiency.

Specific performance of part of contract where part unperformed is small.

Illustrations.

(a) A contracts to sell B. a piece of land consisting of 100 bighás. It turns out that 98 bighás of the land belong to A., and the two remaining bighás to a stranger, who refuse to part with them. The two bighás are not necessary for the use or enjoyment of the 98 bighás, nor so important for such use or enjoyment that the loss of them may not be made good in money (f). A. may be directed at the suit of B. to convey to B. the 98 bighás and to make compensation to him for not conveying the two remaining bighás; or B. may be directed, at the suit of A., to pay to A., on receiving the conveyance and possession of the land, the stipulated purchase-money, less a sum awarded as compensation for the deficiency.

(b) In a contract for the sale and purchase of a house and lands for two lakhs of rupees, it is agreed that part of the furniture should be taken

(f) As if they were, for example, frontage: *Arnold v. Arnold* (1880) 14 Ch. Div. 270.

at a valuation. The Court may direct specific performance of the contract notwithstanding the parties are unable to agree as to the valuation of the furniture, and may either have the furniture valued in the suit and include it in the decree for specific performance, or may confine its decree to the house.

[*Richardson v. Smith* (1870) L. R. 5 Ch. 648: here the discretion of the Court is more broadly stated.]

Sections 14, 15 : Questions of performance with compensation.—

We now come to an important group of sections dealing with classes of cases in which specific performance may be granted with or subject to special conditions or restrictions. Such cases are put by English lawyers under the rubric 'Specific performance with compensation.' In English practice they are confined to contracts for the transfer of immovable property; they are almost always complicated by special terms of agreement, or conditions of sale if the sale was by auction, the effect of which on the general rules has to be considered; and the arguments and judgments of course assume knowledge of English tenures, conveyancing, and habits of dealing. For these reasons alone English decisions on this subject would have to be used with great caution in India; but we shall presently see that Indian legislation has deliberately declined to follow the system of the English courts in its minuter distinctions. Moreover, the general tendency of the earlier authorities is now discredited in their own jurisdiction. In later cases strong remarks have been made by eminent judges on the unfortunate adventures of Courts of Equity in "Making bargains for the contracting parties which they never would have made for themselves" (u). So much by way of warning.

General principles as to compensation—The principles applicable in different kinds of circumstances in English law are summed up concisely in a recent judgment of the Judicial Committee. The question for the Court is always whether the contract can be executed in substance. "If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has

(u) *Arnold v. Arnold* (1880) 14 Ch. Specific Performance, s. 1217, 5th ed., Div. 270, 279, 284: and see Fry on p. 601.

S. R. A. not, by misrepresentation or otherwise, disentitled himself to his
S. 14. remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser, who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement of the purchase-money. But this right applies only to a deficiency in the subject-matter described in the contract" (v). The decision in this case was that a purchaser could not have compensation for a misrepresentation as to the quantity of fencing on the land, that being a collateral matter not affecting the description of the thing sold. Observe that in the case of the deficiency being such that the seller cannot claim specific performance, s. 15 of the Specific Relief Act, departing from the English authorities, allows the buyer to claim it only on the terms of waiving any right to compensation.

The Specific Relief Act does not, of course, define the conditions under which misrepresentation will in general make a contract voidable, for which see ss. 18, 19 of the Contract Act above, pp. 118, 124 *sqq.*

When compensation not admissible.—The chief difficulty in applying the rule here laid down is to know what kind or amount of shortcoming on a vendor's part will be deemed not to admit of compensation in money. As long ago as 1834 the general principle was defined (for it is impossible to anticipate the details of individual cases) in a passage now received as classical. "Where the misdescription, although not proceeding from fraud (u) is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether," and this even if there is a special condition to the effect that errors in description shall not annul the contract but shall be matter for

(v) *Rutherford v. Acton-Adams* (appeal and commentary above. We are not from New Zealand) [1915] A. C. 866. concerned with it here.

(w) As to fraud, see I. C. A., s. 17,

compensation. "The purchaser is not bound to resort to the clause of compensation" if the defect is such that he "may be considered as not having purchased the thing which was really the subject of the sale." So the Court of Common Pleas declared the law in a case where a lease was subject to much more burdensome restrictions as to the use of the premises than appeared in the particulars of sale (x) : and the statement has been approved and followed ever since. The test is whether the purchaser gets substantially what he contracted to buy (y). If performance with money compensation will not give him satisfaction to that extent, he is not bound to complete. The words of section 14 "the part which must be left unperformed bears only a small proportion to the whole in value" do not leave, and doubtless were intended not to leave, so much discretion to the Court as results on the whole from the English authorities.

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15. Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.

Specific performance of part of contract where part unperformed is large.

Illustrations.

(a) A. contracts to sell to B. a piece of land consisting of 100 bigh's. It turns out that 50 bigh's of the land belong to A., and the other 50 bigh's to a stranger, who refuses to part with them. A. cannot obtain a

(x) *Flight v. Booth*, 1 Bing. N. C. 370; 41 R. R. 599. The difference between being subject to one lease, as described, and being

(y) So all the members of the C. A. in fact subject to several distinct leases in nearly the same words, *Fawcett and Holmes' Contract* (1889) 42 Ch. Div. 150. is substantial: *Lee v. Rayson* [1917] 1 Ch. 613.

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S. 15.

decree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the 50 bighas which belong to A., waiving all rights to compensation either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a decree directing A. to convey those 50 bighas to him on payment of the purchase-money.

(b) A. contracts to sell to B. an estate with a house and garden for a lakh of rupees. The garden is important for the enjoyment of the house. It turns out that A. is unable to convey the garden. A. cannot obtain a decree against B. for the specific performance of the contract; but if B. is willing to pay the price agreed upon, and to take the estate and house without the garden, waiving all right to compensation either for the deficiency or for loss sustained by him through A.'s neglect or default, B. is entitled to a decree directing A. to convey the house to him on payment of the purchase-money.

Variation from English Law.—This section agrees with English law in allowing a purchaser (for it is mere affectation to ignore the practically limited application of the rules) to enforce specific performance at his option under the named conditions, although the vendor cannot claim it. But the Indian enactment clearly excludes, in such cases, any claim of the purchaser to compensation, thus making a considerable and (it must be presumed) deliberate departure from English authority. There is some reason to doubt whether in fact the draftsman of the Specific Relief Act clearly understood how much he was doing, but after the lapse of more than forty years this is only matter of curiosity. In England the party electing to affirm the contract, when he might have rescinded it, is or is not entitled to claim performance with compensation according as the deficiency (not necessarily a defect in quality) in the property sold is or is not capable of valuation in money; but he may further be debarred from claiming compensation by considerations arising from his knowledge of the defect or remissness in discovering it, possible prejudice to third parties, or other special circumstances. It would be useless for Indian purposes, and might even be misleading, to say more of complications which the British Indian legislature has expressly refused to admit. In the United States, so far as we are informed, the English doctrine is received in a general way, but performance with compensation is in practice enforced only at the suit of a purchaser, and the topic as a whole is of subordinate importance. A student o

comparative law may well think it more remarkable that this peculiar learning has been adopted at all in Indian legislation than that some of its refinements have been rejected. See notes to s. 14 above.

Contracts for sale by one of several Hindu co-parceners.—The question how far the provisions of this section apply to contracts entered into by a member of a joint Hindu family for the sale of immovable property belonging to the joint family has been discussed in several cases. These cases may be divided into the following two groups :—

1. A., B., and C., three brothers, are members of a joint Hindu family. A., as *managing member of the family*, agrees to sell certain land belonging to the family to P. B. and C. are not parties to the contract. P. sues A., B. and C. for specific performance. In such a case it has been held that the suit as against B. and C. should be dismissed, they not being parties to the contract, but that, as against A., P. is entitled to a decree directing A. to convey the *entire* property to P. on payment of the whole consideration, without determining whether the sale would or would not bind the interests of B. and C. in the property (z). Obviously the Courts thought in these cases that it was not necessary to have a distinct finding as whether there was any necessity for the sale so as to render it binding on B. and C. In later cases, which also were cases in special appeal, it has been held that if there is a finding recorded that there was no necessity for the sale, no such decree should be passed even against A., and that the suit should be dismissed altogether (a). But there is a difference of opinion as to whether if P. is willing to pay the whole price and demands a transfer of A.'s interest alone in the property, the Court has the power under the present section to decree specific performance as regards A.'s interest, it being held in some cases that it has (b), while in others that it has not (c).

(z) *Kosuri v. Ivalury* (1903) 26 Mad. 74; *Shrinivasa v. Sivarama* (1909) 32 Mad. 320. No such decree can be passed, if the coparcenary has ceased and the property is held by A., B. and C. as tenants in-common: *Govind v. Apathasahaya* (1912) 37 Mad. 403.

(a) *Nagia v. Venkatarama* (1912) 37 Mad. 387; *Daveur v. Kakuturi* (1914) 38 Mad. 1187.

(b) (1912) 37 Mad. 387, 389, *supra*.

(c) (1909) 32 Mad. 320, 312, *supra*; (1914) 38 Mad. 1187, 1191-1192.

S. R. A. II. A., B., C. and D. are members of a joint Hindu family. C.
Ss. 15, 16. and D. are both minors. A. and B., and B. as guardian of C. and
 D. agree to sell certain land belonging to the family to P. P. sues
 A., B., C. and D. for specific performance. It is found that the
 contract was not for purposes binding on the minors. Here no decree
 can be passed against C. and D., but a decree may be passed under the
 present section against A. and B. directing A. and B. to transfer their
 interest in the property on payment of the whole price. P. is
 not entitled to a decree directing a transfer of the whole of the
 property (*d*).

It is difficult to see, as regards the applications of the present section, any substantial distinction between the two classes of cases. It is submitted that in Bengal and N. W. Provinces where the law does not recognize an alienation by a Hindu coparcener of his undivided coparcenary interest, no specific performance should be decreed in respect of a coparcener's interest. And even in Bombay and Madras where the law allows such an alienation, the Court, it is submitted, should not decree such performance. The reason is that such alienations are "inconsistent with the strict theory of a joint and undivided Hindu family; and the law as established in Madras and Bombay has been one of gradual growth, founded upon the equity which a purchaser for value has to be allowed to stand in his vendor's shoes" (*e*). Even in Madras and Bombay what the law recognizes is a completed transfer, and not a mere contract for sale. It is, however, different, when the intended alienation is one for a legal necessity.

16. When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically

Specific performance of independent part of contract.

(*d*) *Poraka v. Vadlamudi* (1910) 33 Mad. 359; *Adikesavan v. Guranatha* (1917) 40 Mad. 338. 340. In *Gurusami v. Ganapathia* (1879) 5 Mad. 337 [F.B.], the contract was made before the passing of the S. R. Act, and the purchaser was held entitled to an abatement. As to the manager's liability for damages, see 40 Mad. 338, cited above.

(*e*) *Suraj Bansi Koer v. Sheo Prasad Singh* (1879) 6 I. A. 88, 102, 5 Cal. 148, 166.

performed, the Court may direct specific performance of the former part. S. R. A
S. 16.

Divisible and indivisible contracts.—Whenever it is asserted on one side and denied on the other that certain obligations between the parties are so connected that it would be unjust to enforce one of them alone, the first thing to make sure of is whether there is only one contract or more than one. Not that this will always suffice for deciding the dispute, but it will put us on the road to a decision. Not that the preliminary inquiry will always be simple; it may involve doubtful matters of law, construction, or fact; but it must be capable of a definite solution.

If there is any contract, there is either one or more than one. If there is only one, it is reasonable to suppose that the parties intended it to be dealt with as a whole and not piecemeal, unless and until the contrary is shown. In technical terms, the contract is presumed to be entire. If there are more than one, the natural inference is the other way, and we shall assume that each contract may be separately and independently enforced, unless such a substantial and intimate connexion is shown between apparently distinct agreements as would make the obvious construction unreasonable. A clear and express statement of the parties' intention would of course leave no room for dispute; but such a declaration is seldom found. These observations may seem elementary even to baldness; but perhaps a little more attention to their substance might have saved some learned persons from futile perplexity; for nothing is so apt as the neglect of elementary principles to confuse the discussion of controverted and complicated facts.

Given an entire contract, its nature may be such that only part of it can, according to the general rules, be enforced by way of specific performance. It would obviously not be just to enforce that part while the other remained to be performed and could not be effectually controlled by the Court. Further, it is obvious that a court of justice cannot order a party to do that which would contravene any general law or be a breach of any existing personal duty. Hence the carefully guarded language of s. 16. For the better general understanding of the subject, we will now mention some examples of the manner in which the principles are applied in English Courts.

S. R. A. **English examples.**—It has long been settled law that on a
S. 16. sale by auction of an estate divided into lots there is a separate contract with the purchaser of each lot, and not the less so if the purchaser of two or more lots is the same person ; so that , as a rule, a defect in the title to one lot will not affect the purchaser's obligation to take another. Nevertheless there may be facts within the knowledge of both parties establishing such a connexion in use and enjoyment between two separate lots as to show that the purchaser bought them for a single purpose and would "not have taken the one, had he not reckoned upon also having the other." Whether such a state of things exists is a question of fact to be tried as such in the regular course. If this is proved, the failure of the seller to convey the one lot will be a ground for the buyer to claim to be released from his contract as to the other (*f*). Cases of this kind are not frequent.

A more usual species is that of a single instrument containing several undertakings on which the question arises whether they are separately enforceable. "As a general rule all agreements must be considered as entire. Generally speaking, the consideration for the whole and each part of an agreement by one party is the performance of the whole of it by the other, and if the Court is not in a position to compel the plaintiff, who comes for specific performance, to perform the whole of it on his part, the Court will not compel the defendant to perform his part or any part of the agreement" (*g*). Accordingly specific performance has been refused of an agreement to grant a lease, where the terms included the maintenance of a railway by the lessee on the land demised, (*h*) and of a covenant in a lease to appoint a servant to perform specified duties for the benefit of occupiers : (*i*) these being such undertakings as the Court could not superintend.

There are kinds of business, however, where the needs and constant practice of the business require a different construction. Where in a single agreement for a building lease the land is mapped out in-

(*f*) *Casamajor v. Strode* (1834) 2 My. & K. 706, 39 R. R. 339. (*h*) *Blackett v. Bates* (1865) L. R. 1 Ch. 117.

(*g*) *Mellish, L.J., Wilkinson v. Clements* (1872) L. R. 8 Ch. at p. 110. (*i*) *Ryan v. Westminster Chambers Association* [1893] 1 Ch. 116.

plots, and the lessee undertakes to build a certain number of houses on each plot, and, when he has built and finished them to the lessor's satisfaction, is to be entitled to one or more separate leases of the respective plot; there it is held that the lessee's right to a lease of any lot, whether in his own hands or in those of an assignee, is independent of the performance of the terms as to the other lots. In fact a building lessee works with capital borrowed in instalments which he would be unable to raise as required if the lender's security depended on the fulfilment of the builder's obligations over the whole of the property (j).

S. R. A.
Ss. 16, 17

Simultaneous agreements by A. to sell Whiteacre to B. and by B. to sell Blackacre to A. are not, without more, an entire contract even if recorded in one memorandum, but severable; and, according to the general rule of evidence, extrinsic evidence is not admissible to show that an exchange was intended (k).

Where specific performance is claimed by some of several purchasers.—Where there is a single contract for the sale of immovable property by the owner thereof to several persons, specific performance cannot be decreed against the vendor at the suit only of some of those persons, if the others refuse to join them in claiming performance. The present section does not apply to such a case (l).

17. The Court shall not direct the specific performance of a part of a contract, except in cases coming under one or other of the three last preceding sections.

Bar in other cases of specific performance of part of contract.

This section appears to be inserted out of abundant caution to guard against speculative extensions of the jurisdiction. Having regard to the reason of the thing and to the language of ss. 14, 15, it does not seem applicable to a case where all the rest of the contract has already been performed. As to the jurisdiction to restrain the breach of a negative agreement by injunction, notwithstanding that it may have the effect of

(j) *Wilkinson v. Clements* (1872) 5 K. 251, 39 R. R. 195.

L. R. 8 Ch. 96.

(l) *Sofur Rahman v. Maharamun-*

(k) *Oroome v. Lediard* (1823) 2 Myl. 111, 112. *nessa Bibi* (1897) 24 Cal. 832.

- S. R. A. enforcing part of a contract of which, as a whole, specific performance
 S. 18. could not be decreed, sec s. 57 of this Act.

12. Where a person contracts to sell or let certain
 property, having only an imperfect title
 thereto, the purchaser or lessee (except
 as otherwise provided by this Chapter)
 has the following rights :—

Purchaser's
 rights against
 vendor with im-
 perfect title.

- (a) if the vendor or lessor has subsequently to the sale or lease acquired any interest in the property, the purchaser or lessee may compel him to make good the contract out of such interest ;
- (b) where the concurrence of other persons is necessary to validate the title, and they are bound to convey at the vendor's or lessor's request, the purchaser or lessee may compel him to procure such concurrence ;
- (c) where the vendor professes to sell unencumbered property, but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgage and to obtain a conveyance from the mortgagee ;
- (d) where the vendor or lessor sues for specific performance of the contract, and the suit is dismissed on the ground of his imperfect title, the defendant has a right to a return of his deposit (if any) with interest thereon, to his costs of the suit, and to a lien for such deposit, interest and costs on the interest of the vendor or lessor in the property agreed to be sold or let.

S. R. A
S. 18.

Contents of the section.—*Contract must be performed according to ability at time of performance.*—Sub-s. (a) is really very plain justice. A sellers' obligation is determined by the contract; he is bound to fulfil it if he can when he is called upon to do so, and the Court will then compel him to the full extent of his present ability if it is a proper case for specific performance. The seller is likewise entitled to enforce the contract if he can make a good title at the proper time (m).

A man may, if he chooses, bind himself to sell that which he has not but expects to have in time to perform the promise, taking the risk of failure; in the case of goods current in the market there is nothing out of the way in this. Talk about estoppel in this connexion can only make a plain matter obscure. When it occurs (n), it arises from confusion between the creation of a personal obligation and the passing of property, a confusion which was common at one time but should be carefully avoided by all students of equity who wish to keep their heads clear.

Purchaser acquiring outstanding title.—There is one case on record where a purchaser attempted to make an unfair use of this rule: having found an objection to the seller's title, and required it to be removed, which so far was a correct course, he broke off the negotiations and bought up the outstanding interest himself, thus making it impossible for the vendor to complete. The Court would not tolerate this sharp practice and decreed specific performance against the purchaser, allowing him the expenses he had incurred. In substance he was not free, after treating the contract as subsisting, to acquire the outstanding right or supposed right otherwise than as agent for the vendor (o). It is a singular case, but the warning given by the decision goes beyond that particular combination of facts.

Consequential rules.—Sub-secs. (b), (c) declare usual incidental consequences of the principle. Sub-sec. (d) shows that the effect of the Court refusing specific performance on the ground of want of title is a judicial rescission of the contract, with the consequences stated (p).

(m) *Morlock v. Buller* (1804) 10 D. F. & J. 432, 125 R. R. 498: the judgments give the point free from the Ves. at p. 315, 7 R. R. at p. 429.

(n) There is no such thing in Fry on rather intricate details of the narrative Specific Performance. (p) *Turner v. Marriott* (1867) L. R.

(o) *Murrell v. Goodyear* (1860) 1. 3 Eq. 744.

S. R. A. *Vendor's duty as adjoining owner.*—By an extension, as
S. 18. it seems, of the principle declared in sub-sec. (b), a seller may be bound, in peculiar circumstances, to acts or undertakings on his own part to complete those rights or immunities annexed to the title which he has led the buyer to expect, or at any rate may be unable to obtain specific performance except on the terms of satisfying the buyer's expectation (g). It is better, however, to seek for a less artificial solution.

Clause (a) : Interest acquired after sale.—The provisions of this clause are similar to those of s. 43 of the Transfer of Property Act. A good illustration of this clause is afforded by the case where one of two Hindu coparceners agrees to sell property belonging to them as absolute owner thereof. In such a case the purchaser is entitled on the death of the other coparcener to a transfer of the whole property from his vendor (r). Though a judgment-debtor is incompetent to sell or otherwise dispose of his property pending a lease thereof granted by the Collector in the course of execution proceedings (s), yet if he does execute a sale-deed of the property while the case is subsisting, the purchaser is entitled, after the expiry of the lease and the termination of execution proceedings, to possession of the property ; and this is by virtue of the principle underlying the present clause (t). Where the defendant agrees to give a lease to the plaintiff for fifteen years, and before the lease is executed grants a lease of the same land for two years to another person who has no notice of the agreement, the case is one for damages under s. 19, and not a case to which the present clause can have any application. The Allahabad High Court, however, treated the case as one under this clause, and directed the defendant to execute a lease to the plaintiff for the period and upon the terms contained in the

(g) *Baskcomb v. Beckwith* (1869) L. R. 9 Eq. 100, see p. 127 above. But this case is open to the remark that the judgment evades the question what the contract really was. *Qu.* is it not really a case of simple misrepresentation by a misleading though not dishonest plan and particulars, or else of an ambiguous offer which the buyer was justified in

accepting in the sense more favourable to himself ? If so, the Court gave the plaintiff more than his due.

(r) See *Virayya v. Hanumanth* (1890) 14 Mad. 459.

(s) C. P. C., 1882, ss. 323, 325 A, C. P. C., 1908, Sch III, paras 7, 11.

(t) *Magniram v. Bakubai* (1912) 36 Bom. 510.

agreement, the lease to take effect after the determination of the existing lease (u). This decision, it is submitted, is obviously wrong: S. R. A. S. 18.

By s. 6 of the Transfer of Property Act it is enacted that "the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred." The interest of a Hindu reversioner as well as that of a Mahomedan heir in the estate of his ancestor is mere *spes successionis*, and it is neither transferable nor releasable (v). It has accordingly been held (w) that though a Mahomedan daughter may in consideration of money paid to her by her father release her interest in her father's estate, the release is no bar to a claim by her after her father's death to her share of inheritance in his estate. It was contended in that case that the release was binding on the daughter on the principle that equity considers that done which ought to be done. But this contention was overruled on the ground that to give effect to it would be to defeat the express provisions of s. 6 of the Transfer of Property Act. This case is distinguishable from the following case which is an illustration to s. 43 of the Transfer of Property Act: "A., a Hindu, who has separated from his father B., sells to C. three fields, X., Y. and Z., representing that A. is authorized to transfer the same. Of these fields Z. does not belong to A., it having been retained by B. on partition; but, on B.'s dying, A. as heir obtains Z., C., not having rescinded the contract of sale, may require A. to deliver Z. to him." This is not a case of a transfer of *spes successionis*, but of a specific property.

Clause (d): Return of deposit.—In the absence of a contract to the contrary a vendor is bound to give the purchaser "a title free from reasonable doubt" [see s. 25 (b) below]. If the vendor sues for specific performance, but specific performance is refused on the ground that he could not give a title free from reasonable doubt, the purchaser is entitled to a return of his deposit (x). There

(u) *Serju Prasad v. Wazir Ali* (1900) 23 All. 119.

(v) *Sham Sunder Lal v. Achhan Kunwar* (1898) 25 I. A. 183, 189, 21 All. 71; *Janaki Ammal v. Narayanasami* (1916) 43 I. A. 207, 209, 39 Mad. 634, 638; *Dhoorjeti v. Dhoorjeti* (1907) 30 Mad.

201; *Sumaiddin v. Abdul Husein* (1907) 31 Bom. 165.

(w) (1907) 31 Bom. 165, *supra*; *Sri Jagannada Raju v. Sri Rajab Prasada Rao* (1916) 39 Mad. 554.

(x) *Haji Mahomed Mitha v. Musaji Eesaji* (1891) 15 Bom. 657, 669.

S. R. A. is a similar provision in s. 55 (6) (b) of the Transfer of Property Act
S. 18. by which it is enacted that when the purchaser "properly declines" to accept delivery of the property, he is entitled to a charge on the property for the earnest. Whether a purchaser has "properly" declined to accept delivery of the property depends on the terms of the contract and the circumstances of the case. Where a purchaser refuses to complete alleging that the title is defective, he is entitled to a refund of the deposit if he was justified in refusing the title, but not if he was bound to accept the title. Thus where a vendor agrees to sell land and the buildings thereon, but it turns out that the only interest he has in the land is a revocable license to occupy the land, and the purchaser refuses to complete, he is entitled to a return of the deposit (y).

Where a contract contains a clause as to what is to be done with the deposit if the contract is not performed, the Court must be guided by the terms of the contract, and the rights of the parties are to be determined as in the case of any other contract (z). Where there is no such clause, the Courts of British India have followed the principles laid down in the following passage in the judgment of Cotton, L.J., in *Howe v. Smith* (a):—

"There is a variance, no doubt, in the expressions of opinion, if not in the decisions, with reference to the return of the deposit, but I think that the judgment of Lord Justice James (b) gives us the principle on which we should deal with the case. What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to James, L.J., he can have no right to recover the deposit.

"I do not say that in all cases where this Court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may

(y) *Ibrahimbai v. Fletcher* (1897) 21 Bom. 827, 853.

(z) *Howe v. Smith* (1884) 27 Ch. Div. 89, 97. If time is not of the essence of the contract, and the purchaser offers to complete within a reasonable time from the date for performance fixed in the contract, the vendor is not entitled to forfeit the deposit, even if the contract provides for forfeiture in default of completion on the date fixed: *Jamshed v. Burjorji* (1916) 43 I. A. 26, 40 Bom. 289.

(a) (1884) 27 Ch. Div. 89, 95.
 (b) In *Ex parte Barrell* (1879) L. R. 10 Ch. 512.

well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion, there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

S. R. &
S. 18.

In *Howe v. Smith*, the contract was for sale of real estate, and it was to be performed on the 21th of April, 1881. The completion of the purchase was delayed by the purchaser, and the vendor, after pressing for completion, agreed on the 20th of June, 1881, to extend the time for completion for a month, on payment of certain costs but at the same time warned the purchaser that unless the purchase-money was then paid he would re-sell the property. The purchaser failed to complete within a month, and on 25th of July he, fearing that the vendor would re-sell the property, brought an action against the vendor for specific performance. From the conduct of the purchaser and from the correspondence it appeared that the purchaser never was up to, and even at, the time when he brought the action, ready with the money in order to purchase the estate. The Court held that he was neither entitled to specific performance nor to a return of the deposit. Following this decision, the High Court of Madras, in a case in which the facts were more or less similar, refused specific performance to the purchaser and held also that he was not entitled to a return of the deposit (c). Upon the same principle it has been held that where a contract for sale goes off by default of the purchaser, the vendor is entitled to retain the deposit (d). But where there is no repudiation of the contract by the purchaser nor any conduct on his part amounting to repudiation, he is entitled to a return of the deposit, though specific performance is refused (e).

(c) *Natesa Aiyar v. Appavu* (1913) 38 Mad. 178 [F. B.]; *Veerayya v. Sivayya* (1914) 27 Mad. L. J. 482. *Ltd.* (1911) 33 All. 166 (sale of goods).
 (d) *Bishan Chand v. Radha Kishan Das* (1897) 19 All. 489; *Roshan Lal v. Delhi Cloth & General Mills Co., Ltd.* (1897) 21 Bom. 827 [F. B.]; *Alokeshi Dassi v. Hara Chand Dassi* (1897) 24 Cal. 897; *Ibrahimhai v. Fletcher* (1897) 21 Bom. 827 [F. B.]; *Balvanta v. Bira* (1899) 23 Bom. 56, 60-61.

S. R. A.
ls. 18, 19.

The dismissal of a purchaser's suit for specific performance is no bar to a separate suit for a return of the deposit (f). It is, however, desirable that the right to a return of the deposit should be determined in the suit for specific performance, and if the plaintiff has not in his suit for specific performance made a claim in the alternative for a return of the deposit, he should be allowed to amend the plaint, though the amendment may be asked for at a late stage of the case (g).

A deposit is not a penalty, but a payment in part of the purchase money, made as a guarantee that the contract will be performed. It results from this that if the seller seeks to recover damages beyond the amount of the deposit, he must give credit for the deposit which he has retained. Thus if it is provided by the terms of a contract that if the purchaser should fail to comply with the conditions, the deposit should be forfeited to the vendor, and that the vendor should be entitled to resell the property and recover from the purchaser the deficiency upon resale, the deposit, though forfeited, is to be taken into account in estimating the loss on a resale, and it is to be deducted from the deficiency upon resale so as to diminish the deficiency (h).

19. Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to, or in substitution for, such performance.

Power to award compensation in certain cases.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

If in any such suit the Court decides that specific performance ought to be granted, but that it is not

(f) *Parangodan v. Perumtoduks* (1884) 27 Ch. Div. 89, 91.

(1904) 27 Mad. 380.

(h) *Ockenden v. Henly* (1858) E. B.

(g) *Ibrahimkhai v. Fletcher* (1897) & E. 485; *The Vellore Taluk Board v. 21 Bom. 827, 851-852; Howe v. Smith Gopalasami* (1913) 38 Mad. 801.

sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

S. R. A
S. 19.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

Explanation.—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section.

Illustrations.

of the second paragraph —

A. contracts to sell a hundred mounds of rice to B. B. brings a suit to compel A. to perform the contract or to pay compensation. The Court is of opinion that A. has made a valid contract and has broken it, without excuse, to the injury of B., but that specific performance is not the proper remedy. It shall award to B. such compensation as it deems just.

of the third paragraph —

A. contracts with B. to sell him a house for Rs. 1,000, the price to be paid and the possession given on the 1st January, 1877. A. fails to perform his part of the contract, and B. brings his suit for specific performance and compensation, which is decided in his favour on the 1st January, 1878. The decree may, besides ordering specific performance, award to B. compensation for any loss which he has sustained by A.'s refusal.

of the Explanation—

A., a purchaser, sues B., his vendor, for specific performance of a contract for the sale of a patent. Before the hearing of the suit the patent expires. The Court may award A. compensation for the non-performance of the contract, and may, if necessary, amend the plaint for that purpose.

A. sues for the specific performance of a resolution passed by the Directors of a public company, under which he was entitled to have a certain number of shares allotted to him, and for compensation for the non-performance of the resolution. All the shares had been allotted before the institution of the suit. The Court may, under this section, award A. compensation for the non-performance (i).

Frame of the section.—The particularity of the language is due to the fact that the jurisdiction to award damages was in

(i) *Ferguson v. Wilson* (1866) L. R. 2 Ch. 77, shows the imperfection of the old English chancery jurisdiction even after amendment by statute, which gave only a strictly alternative power to award damages.

S. R. A. the English Court of Chancery a statutory novelty dating from
Ss. 19, 20. about the middle of the nineteenth century. There is no such question of limited jurisdiction in India as those which troubled courts of equity in England, and the explanation makes it clear that English precedents of that kind are wholly inapplicable.

Damages may be awarded though not asked for.—Where the case for specific performance or injunction fails, the Court may itself award damages or order an inquiry as to damages, though no damages be asked for in the plaint (j).

Subsequent suit for damages.—The dismissal of a suit for specific performance or for an injunction is a bar to a fresh suit for damages in respect of the same cause of action. See s. 29, below.

20. A contract, otherwise proper to be specifically enforced, may be thus enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same.

Liquidation of damages not a bar to specific performance.

Illustration.

A contracts to grant B. an under-lease of property held by A. under C., and that he will apply to C. for a license necessary to the validity of the under-lease, and that, if the license is not procured, A. will pay B. Rs. 10,000. A. refuses to apply for the license and offers to pay B. the Rs. 10,000. B. is nevertheless entitled to have the contract specifically enforced if C. consents to give the license.

[*Long v. Bowering* (1864) 33 Beav. 585, 140 R. R. 272.]

Penalties and damages.—This section is only remotely connected with the general rule as to consequential penalties and liquidated damages, as to which see I. C. A., s. 74. It does not touch the case of an express contract giving an option to the promisor. If on the true construction it appears that such is the contract, it will be enforced accordingly to its terms.

(j) *Krishna Aiyar v. Shamanna v. Narsi* (1895) 19 Bom. 764^a 770. (1912) 23 Mad. L. J. 610, 617; *Callianji*

Liquidation of damages not a bar to specific performance.— S. R. A. The principle of this section applies also to injunctions. *Tha. Ss. 20, 21.* if a case be a proper one for an injunction, the fact that the contract contains a provision for a penalty for its non-performance is no bar to an award of relief by way of injunction (*x*).

(b) Contracts which cannot be specifically enforced.

Contracts not specifically enforceable. **21.** The following contracts cannot be specifically enforced :—

- (a) a contract for the non-performance of which compensation in money is an adequate relief ;
- (b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the Court cannot enforce specific performance of its material terms ;
- (c) a contract the terms of which the Court cannot find with reasonable certainty ;
- (d) a contract which is in its nature revocable ;
- (e) a contract made by trustees either in excess of their powers or in breach of their trust ;
- (f) a contract made by or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers ;
- (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date ;
- (h) a contract of which a material part of the subject-matter, supposed by both parties to exist, has, before it has been made, ceased to exist.

(k) *Madras Ry. Co. v. Rust* (1891) 14 Mad. 18, 22.

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And, save as provided by the Code of Civil Procedure [and the Indian Arbitration Act, 1899,] (l), no contract to refer [present or future differences] (m) to arbitration shall be specifically enforced (n); but if any person who has made such a contract and has refused to perform it sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit.

Illustrations—

to (a)—

A. contracts to sell, and B. contracts to buy, a lakh of rupees in the four per cent. loan of the Government of India :

A. contracts to sell, and B. contracts to buy, 40 chests of indigo at Rs. 1,000 per chest :

In consideration of certain property having been transferred by A. to B., B. contracts to open a credit in A.'s favour to the extent of Rs. 10,000, and to honour A.'s drafts to that amount.

[*Larios v. Bonany* (1873) L. R. 5 P. C. 346.]

The above contracts cannot be specifically enforced, for in the first and second both A. and B. and in the third A., would be reimbursed by compensation in money.

to (b)—

A. contracts to render personal service to B. :

A. contracts to employ B. on personal service :

A., an author, contracts with B., a publisher, to complete a literary work.

B. cannot enforce specific performance of these contracts.

A. contracts to buy B.'s business at the amount of a valuation to be made by two valuers, one to be named by A. and the other by B. A. and B. each name a valuer, but before the valuation is made A. instructs his valuer not to proceed.

[*Vickers v. Vickers* (1867) L. R. 4 Eq. 529. It is clear that there is not a contract capable of specific enforcement, but not clear why A. should not be restrained from interfering with the valuation.]

By a charter-party entered into in Calcutta between A., the owner of a ship, and B., the charterer, it is agreed that the ship shall proceed to

(l) These words were added by s. 21 of the Indian Arbitration Act, 1899 (IX of 1899).

(m) These words were substituted for the words "a controversy" by the Indian Arbitration Act, 1899 (IX of

1899), s. 21.

(n) The last 37 words of s. 21 do not apply to any submission or arbitration to which the provisions of the Indian Arbitration Act, 1899 (IX of 1899) apply; see s. 3 of that Act.

Rangoon, and there load a cargo of rice, and thence proceed to London, freight to be paid, one-third on arrival at Rangoon, and two-thirds on delivery of the cargo in London :

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[*Cp. Le Blanch v. Granger* (1866) 35 Beav. 187, 147 R. R. 105.]

A. lets land to B. and B. contracts to cultivate it in a particular manner for three years next after the date of the lease :

A. and B. contract that, in consideration of annual advances to be made by A., B. will for three years next after the date of the contract grow particular crops on the land in his possession and deliver them to A. when cut and ready for delivery :

A. contracts with B. that, in consideration of Rs. 1,000 to be paid to him by B., he will paint a picture for B. :

A. contracts with B. to execute certain works which the Court cannot superintend :

A. contracts to supply B. with all the goods of a certain class which B. may require :

[Here there is no contract until B. gives a definite order : see p. 32 above.]

A. contracts with B. to take from B. a lease of a certain house for a specified term, at a specified rent, "if the drawing room is handsomely decorated," even if it is held to have so much certainty that compensation can be recovered for its breach :

[*Taylor v. Portington* (1855) 7 D. M. & G. 328, 109 R. R. 147: An authority which probably would not be extended.]

A. contracts to marry B. :

The above contracts cannot be specifically enforced.

to (c)—

A., the owner of a refreshment-room, contracts with B. to give him accommodation there for the sale of his goods and to furnish him with the necessary appliances. A. refuses to perform his contract. The case is one for compensation and not for specific performance, the amount and nature of the accommodation and appliances being undefined.

[*Paris Chocolate Co. v. Crystal Palace Co.* (1855) 3 Sm. & G. 119, 107 R. R. 49: the reason adopted in the illustration was not the only one.]

to (d)—

A. and B. contract to become partners in a certain business, the contract not specifying the duration of the proposed partnership. This contract cannot be specifically performed, for, if it were so performed, either A. or B. might at once dissolve the partnership.

[*Scott v. Rayment* (1868) L. R. 7 Eq. 112. It may be otherwise if the partnership is for a defined term: *England v. Curling* (1844) 8 Beav. 129, 68 R. R. 39.]

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to (c)—

A. is a trustee of land with power to lease it for seven years. He enters into a contract with B. to grant a lease of the land for seven years, with a covenant to renew the lease at the expiry of the term. This contract cannot be specifically enforced.

The Directors of a company have power to sell the concern with the sanction of a general meeting of the shareholders.

They contract to sell it without any such sanction. This contract cannot be specifically enforced.

Two trustees, A. and B., empowered to sell trust-property worth a lakh of rupees, contract to sell it to C. for Rs. 30,000. The contract is so disadvantageous as to be a breach of trust. C. cannot enforce its specific performance.

The promoters of a company for working mines contract that the company, when formed, shall purchase certain mineral property. They take no proper precautions to ascertain the value of such property, and in fact agree to pay an extravagant price therefor. They also stipulate that the vendors shall give them a bonus out of the purchase-money. This contract cannot be specifically enforced.

[*Mortlock v. Buller* (1804) 10 Ves. 292, 7 R. R. 417, suggested the first and third paragraphs. The second and fourth state plain cases of breach of trust or fiduciary duty.]

to (f)—

A company existing for the sole purpose of making and working a railway contracts for the purchase of a piece of land for the purpose of erecting a cotton mill thereon. This contract cannot be specifically enforced.

[This is the simplified type of an agreement 'ultra vires.' Such simplicity hardly occurs in practice.]

to (g)—

A. contracts to let for twenty-one years to B. the right to use such part of a certain railway made by A. as was upon B.'s land, and that B. should have a right of running carriages over the whole line on certain terms, and might require A. to supply the necessary engine power, and that A. should during the term keep the whole railway in good repair. Specific performance of this contract must be refused to B.

[*Blackett v. Bates* (1865) L. R. 1 Ch. 117 has supplied the facts.]

to (h)—

A. contracts to pay an annuity to B. for the lives of C. and D. It turns out that, at the date of the contract, C., though supposed by A. and B. to be alive, was dead. The contract cannot be specifically performed.

[For reported cases of this class, see on I. C. A., s. 2^o, p. 133 above.]

Diversity of cases included.—It is rather unfortunate that this section and the illustrations do not more clearly distinguish cases

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where there is a contract binding in law and enforceable, only not by specific performance, from those where there is no contract at all. Cases under sub-sections (a), (b), and (g) belong to the former class; cases under sub-sections (c), (d), mostly but as the illustrations show—not wholly to the latter; cases under (e) and (f) may belong to either, according as the promisor has or not made himself personally liable besides purporting to bind beneficiaries, or a principal, whom he had no authority to bind; (h) was probably intended to apply only to cases of common mistake, or the failure of a fundamental condition, going to the root of the contract, but its terms are wide enough to cover a partial failure of consideration. But perhaps the use of the word 'contract' in the enacting part was meant to exclude all cases of wholly void agreements, though it is hard to see how 'a contract the terms of which the Court cannot find with reasonable certainty' can escape being an agreement void for uncertainty under s. 29 of the Contract Act.

In clause (d) the word 'revocable' is inaccurate; it should rather have been 'determinable.' There is no such thing as a revocable contract of any kind. But for the illustration, one would have thought the draftsman had in mind such cases as *Moorhouse v. Colvin* (a), where the alleged promise amounts only to an expression of intention to do or give what the promisor himself thinks proper.

The fixed limit of time laid down by clause (g) does not correspond to any rule or presumption in English law. It should be needless to remark that an agreement which is to be performed within three years, or one, or once for all and immediately, may, nevertheless, on one of the other grounds enumerated, be such as the Court will not order to be specifically performed.

Clause (e) is in truth a particular case under a more general principle which is not explicitly asserted in the Act, but of which the justice and necessity are obvious. The Court cannot order a performance that would be a punishable offence, or contravene any statute or public regulation made by lawful authority, or be wrongful against any third person. The case of A. making incompatible agreements with X. and Y. has been considered at p. 45, above, under

(a) (1881) 1 Beav. 311, 92 R.R. 452.

- S. R. A. s. 6 of the Contract Act. As to unlawful agreements in general, see
S. 21. the commentary on I. C. A., e. 23.

Clause (a) : where compensation in money is an adequate relief.—
“An ordinary contract to lend or borrow money, whether on security or otherwise, comes within this category. But supposing money has already been advanced and the borrower refuses to execute a mortgage according to the agreement, the lender would apparently be prejudiced if the loan were to remain without security, and it is difficult to see what difference it would make in this respect whether the entire loan had been advanced or only a portion, if in the latter case the lender has been ready and willing to advance the remaining sum according to the agreement. On the other hand, if the loan was liable to be repaid at once and the borrower is willing to pay it off, there would be no object in decreeing specific performance in such a case” (p). Where money promised as a loan by a mortgagee is not advanced in full, the mortgagor is only entitled to recover, if anything, damages for non-payment of the balance; he cannot sue for specific performance of the agreement to lend the full sum promised (q). See I. C. A., s. 39, notes under the head “Disabled himself from performing,” p. 281, above.

Clause (b).—Contracts involving personal services cannot be specifically enforced (r): see the first three illustrations of cl. (b). Similarly no specific performance can be decreed of a contract to give in marriage (s). Contracts by which a party thereto agrees to execute works which the Court cannot superintend cannot be specifically enforced. So it was held where A. agreed to sell his property consisting of a building and vacant land to B., and B. agreed to build a temple on a portion of the land and to secure an annuity to A. and his wife (t). See also notes to s. 12, “Contracts to execute building or other works,” p. 870 above.

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| <p>(p) <i>Meenakshi Sundara v. Rathnasami</i> (1918) 41 Mad. 959, at p. 967; <i>South African Territories Co. Ltd. v. Wallington</i> [1898] A. C. 309.</p> <p>(q) <i>Phul Chand v. Chand Mal</i> (1908) 30 All. 252; <i>South African Territories Co. Ltd. v. Wallington</i> [1898] A. C. 309; <i>Analsuran v. Savidamadath</i> (1879) 2 Mad. 79; <i>Rajagopala v. Sheik Davood</i> (1918)</p> | <p>34 Mad. L. J. 343; <i>Sheik Galim v. Sadurjan Ribi</i> (1916) 43 Cal. 59.</p> <p>(r), <i>Ram Charan v. Rakhal Das</i> (1914) 41 Cal. 19, 33.</p> <p>(s) <i>In the matter of Gunput Narain Singh</i> (1876) 1 Cal. 74.</p> <p>(t) <i>Ramchandra v. Ramchandra</i> (1898) 22 Bom. 46.</p> |
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Clause (c) : Where the terms cannot be ascertained with reasonable certainty.—Where by the terms of a kabuliat the Government agreed to construct large and small embankments, and to excavate the silt of khals and close the mouths of the khals, the Court refused at the suit of the lessee to pass a decree directing the Government to carry out those works (*u*). The mere difficulty however, in fixing the terms of a contract, is no ground for refusing specific performance. In a case where the contract was that if the lessees wanted more land for the purposes of the lease, the lessors should let such land “at a proper rate”. the Judicial Committee of the Privy Council, dissenting from the view taken by the High Court of Calcutta that it was impossible to determine what was a reasonable rate, said : “Their Lordships cannot think that in the present case the Court, upon a proper inquiry, would have been unable to determine it. There might have been considerable difficulty in fixing the rate ; but difficulties often occur in determining what is a reasonable price or a reasonable rate, or in fixing the amount of damages which a man has sustained under particular circumstances. These are difficulties which the Court is bound to overcome ” (*v*). See I. C. A., s. 29. S. R. A.
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Mutuality.—Specific performance cannot be granted of a contract which can be enforced at the option of only one of the parties. In a modern case a contract was entered into by the guardian of a Mahomedan minor for the purchase of immovable property on behalf of the minor. The suit was brought to enforce specific performance against the vendor. The Judicial Committee held that specific performance could not be decreed of such a contract. Their Lordships said : “They are, . . . of opinion that it is not within the competence of a manager of a minor’s estate or within the competence of a guardian of a minor to bind the minor or the minor’s estate by a contract for the purchase of immovable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain

(*u*) *Chunder Sekhur v. The Collector v. Boloram Mahata* (1880) 7 I. A. 107, of *Midnapore* (1878) 3 Cal. 464. 114, 5 Cal. 932, 937.

(*v*) *The New Beerbhoom Coal Co. Ltd.*

S. R. A. specific performance of the contract." It is immaterial that the
S. 21. purchase was advantageous for the minor (w).

Minors and specific performance.—See notes above under the head "Mutuality," and notes to s. 11 of the I. C. A. under the head "Specific performance," p. 75, above.

Contract to refer to arbitration.—The last clause of s. 28 of the Contract Act is somewhat similar to the last clause of the present section. The former clause has been repealed by the Specific Relief Act except in certain Scheduled Districts where the Specific Relief Act is not in force.

The last clause of the present section does not apply unless (1) there is a contract to refer a controversy to arbitration and (2) the plaintiff has refused to perform it.

"Contract to refer a controversy to arbitration."—The contract the existence of which will bar a suit under the circumstances contemplated by the present clause must be an operative contract and not a contract broken up by the conduct of the parties to it. Thus where nothing was done by either party under the agreement to refer, in one case for more than a year (x), and in another for more than three years (y), it was held that the agreement was no bar to the suit. Upon the same principle, where the plaintiff purports to withdraw from a submission, but no steps are taken by the defendant to enforce the submission by proceedings under the Code of Civil Procedure, it is tantamount to an acquiescence by the defendant in the withdrawal, and the agreement to refer is no bar to the plaintiff's suit (z). Similarly where the arbitrators refused to act and no action was taken by either party for seven years to enforce the agreement, it was held that the agreement was no bar to a suit respecting matters comprised in the agreement (a).

A submission may be revoked for good cause (b). Therefore, where a plaintiff alleges in his plaint that he revoked the submission

(w) *Mir Sarvarjan v. Fakhruddin Mahomed* (1912) 39 I. A. 1, 39 Cal. 232.

(x) *Tahal v. Bisheshar* (1886) 8 All. 57.

(y) *Atma Rai v. Shcobaran Rai* (1882) 2 All. W. N. 58.

(z) *Adhibai v. Cursandas* (1886) 11 Bom. 199.

(a) *Ram Kumar v. Jagmohan* (1911) 33 All. 315.

(b) A submission in cases governed by the Arbitration Act, 1899, cannot be revoked except by leave of the Court unless a different intention is expressed therein: see s. 5 of the Act.

and states the grounds, it is the duty of the Court to inquire whether the submission was revoked in fact and whether there were good grounds for the revocation. The Court should not without such inquiry hold the suit barred under this section (c). S. R. A.
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"Has refused to perform it."—The mere fact of filing a suit is not tantamount to a refusal to perform the contract within the meaning of this clause; it must be shown that the plaintiff has refused to refer to arbitration (d).

"Shall bar the suit".—"The wording of this section is wide enough to cover contracts to refer any matter which can legally be referred to arbitration. One of such matters is a suit proceeding in Court" (e). Therefore, where the parties to a suit refer the matters in difference between them in such suit to arbitration, the further hearing of the suit will be barred under this section (f). See the Code of Civil Procedure, 1908, Sch. II, para. 3 (2).

(c) *Of the Discretion of the Court.*

22. The jurisdiction to decree specific performance is discretionary, and the Court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal.

The following are cases in which the Court may properly exercise a discretion not to decree specific performance:

I. Where the circumstances under which the contract is made are such as to give the plaintiff an unfair advantage over the defendant, though there may be no fraud or misrepresentation on the plaintiff's part.

(c) *L. Naidhar v. Sital Prasad* (1907) 29 All. 12.

(d) *Koomud Chunder v. Chunder Kant* (1880) 5 Cal. 498; *Tahul v. Bisheshwar* (1886) 8 All. 57.

(e) *Sheoambar v. Deodat* (1887) 9 All. 168, 170 171.

(f) *Sheo Dutt v. Sheo Shankar* (1905) 27 All. 52; *Salig Ram v. Jhunna Kuar* (1882) 4 All. 546.

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Illustrations.

(a) A., a tenant for life of certain property, assigns his interest therein to B. C. contracts to buy, and B. contracts to sell, that interest. Before the contract is completed, A. receives a mortal injury from the effects of which he dies the day after the contract is executed. If B. and C. were equally ignorant or equally aware of the fact, B. is entitled to specific performance of the contract. If B. knew the fact, and C. did not, specific performance of the contract should be refused to B.

[*Ellard v. Lord Llandaff* (1809, Ireland) 1 Ball & Beatty, 241, 12 R. R. 22; the tenant for life's condition was in fact within the seller's special knowledge, which is not noticed in Chitty, J.'s, critical remarks in *Turner v. Green* [1895] 2 Ch. at p. 209; *Qu.* whether it was not really a case of fraud. This illustration, any how, adopts *Ellard v. Lord Llandaff* to its full extent.]

(b) A. contracts to sell to B. the interest of C. in certain stock-in-trade. It is stipulated that the sale shall stand good even though it should turn out that C.'s interest is worth nothing. In fact, the value of C.'s interest depends on the result of certain partnership-accounts, on which he is heavily in debt to his partners. This indebtedness is known to A., but not to B. Specific performance of the contract should be refused to A.

[*Smith v. Harrison* (1857) 26 L. J. Ch. 412, 112 R. R. 412. The sale is voidable.]

(c) A. contracts to sell, and B. contracts to buy, certain land. To protect the land from floods, it is necessary for its owner to maintain an expensive embankment. B. does not know of this circumstance, and A. conceals it from him. Specific performance of the contract should be refused to A.

[*Shirley v. Stratton* (1785) 1 Bro. C. C. 440: no reasons reported. "Industrious concealment" of course amounts to fraud.]

(d) A.'s property is put to auction. B. requests C., A.'s attorney, to bid for him. C. does this inadvertently and in good faith. The persons present, seeing the vendor's attorney bidding, think that he is a mere puffer and cease to compete. The lot is knocked down to B. at a low price. Specific performance of the contract should be refused to B.

[*Twining v. Morrice* (1788) 2 Bro. C. C. 326.]

II. Where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff.

Illustrations.

(e) A. is entitled to some land under his father's will on condition that, if he sells it within twenty-five years, half the purchase-money shall go to B. A., forgetting the condition, contracts, before the expiration of the twenty-

five years, to sell the land to C. Here, the enforcement of the contract would operate so harshly on A., that the Court will not compel its specific performance in favour of C.

[A decision of Lord Harwicke's of which there is no regular report : see Fry on Specific Performance, 215.]

(f) A. and B., trustees, join their beneficiary, C., in a contract to sell the trust-estate to D., and personally agree to exonerate the estate from heavy incumbrances to which it is subject. The purchase-money is not nearly enough to discharge those incumbrances, though, at the date of the contract, the vendors believed it to be sufficient. Specific performance of the contract should be refused to D.

[*Wedgwood v. Adams* (1843) 6 Beav. 600, 63 R. R. 195.]

(g) A., the owner of an estate, contracts to sell it to B., and stipulates that he, A., shall not be obliged to define its boundary. The estate really comprises a valuable property, not known to either to be part of it. Specific performance of the contract should be refused to B., unless he waives his claim to the unknown property.

[Simplified from *Baxendale v. Sealie* (1854) 19 Beav. 601, 105 R. R. 261.]

(h) A. contracts with B. to sell him certain land, and to make a road to it from a certain railway-station. It is found afterwards that A. cannot make the road without exposing himself to litigation. Specific performance of the part of the contract relating to the road should be refused to B., even though it may be held that he is entitled to specific performance of the rest with compensation for loss of the road.

[*Peacock v. Penson* (1848) 11 Beav. 355, 83 R. R. 193.]

(i) A., a lessee of mines, contracts with B., his lessor, that at any time during the continuance of the lease B. may give notice of his desire to take the machinery and plant used in and about the mines, and that he shall have the articles specified in his notice delivered to him at a valuation on the expiry of the lease. Such a contract might be most injurious to the lessee's business, and specific performance of it should be refused to B.

[*Talbot v. Ford* (1842) 13 Sim. 173, 60 R. R. 314. If the notice had been limited to a prescribed short time before the end of the lease the covenant would be reasonable.]

(j) A. contracts to buy certain land from B. The contract is silent as to access to the land. No right of way to it can be shown to exist. Specific performance of the contract should be refused to B.

[*Deane v. Light* (1857) 8 D. M. & G. 774, 114 R. R. 328.]

(k) A. contracts with B. to buy from B.'s manufactory and not elsewhere all the goods of a certain class used by A. in his trade. The Court cannot compel B. to supply the goods, but if he does not supply them A. may be ruined, unless he is allowed to buy them elsewhere. Specific performance of the contract should be refused to B.

[Apparently suggested by *Hills v. Croal* (1845) 2 Ph. 60, 78 R. R. 23, where the reason given is that the Court is unable to enforce the whole of the

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contract; but the substantial relief there sought was an injunction, as to which see Fry on Specific Performance, 417. There is no word of any one being ruined in the report.]

The following is a case in which the Court may properly exercise a discretion to decree specific performance:—

III. Where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

Illustration.

A. sells land to a railway-company, who contract to execute certain works for his convenience. The company take the land and use it for their railway. Specific performance of the contract to execute the works should be decreed in favour of A.

[*Storer v. G. W. Ry. Co.* (1842) 2 Y. & C. C. C. 48, 60 R. R. 23. The only difficulty in the case was the nature of the performance to be enforced.]

The discretion of the Court.—The accustomed language of English equity judges as to the discretion of the Court in granting specific performance is intimately bound up with the historical limits of their jurisdiction. Everyone who came to a court of equity for relief was bound to show that he had no remedy, or no adequate remedy, in the ordinary jurisdiction of a court of common law. Failing this, his suit would be dismissed “for want of equity”. Now a claim for specific performance assumes the existence of an actionable contract. Therefore the plaintiff had always to face the question: Why is not the common-law right to recover damages good enough for your case? and the Court was, in strictness, always on the defensive against a charge of trespassing on the domain of the common law. The Court of Chancery did indeed establish the presumption that specific performance was the proper remedy on a contract to convey land, but it was only a presumption liable to be displaced; there is no absolute right to this remedy. “The Court exercises a discretion and directs a specific performance unless it should be what is called highly unreasonable to do so;” what incidents or consequences shall be deemed highly unreasonable must depend on the circumstances of the particular case (*g*).

(*g*) Lord Langdale in *Wedgwood v. Marston* (1853) 4 D. M. & G. at p. 239
Adams (1843) 6 Beav. at p. 605, 63 102 R. R. at p. 107.
R. R. at p. 199; approved, *Watson v.*

But, in a Court which has jurisdiction to administer all remedies, what remains of the Chancery doctrine is that the Court will decree that remedy which appears the more just and equitable, subject to the settled rule (expl. to s. 12 above) that specific performance will only for special reasons be refused on a contract for the conveyance of immovable, or granted on a contract for the transfer of movable, property. A Court of unlimited jurisdiction cannot, of course, avoid, as the English Court of Chancery often did, deciding whether there is or is not an enforceable contract.

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The modern rule has been thus declared : " It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance ; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered " (*h*).

Our s. 22 with its sub-divisions and illustrations is really more like an elementary lecture than legislation. We are far from saying that an exposition of this kind was not required or at least useful in 1877.

We have nothing more to add to the identification of the cases that furnished the illustrations except that in some of them the facts as reported have been purposely simplified ; others really have much more to do with injunctions than with specific performance ; in several the limits of equitable jurisdiction, as they existed in England down to 1875, make it very difficult to say whether the Court really thought there was any contract at all ; and Lord Justice Knight Bruce's judgment in *Deane v. Light*, [clause II, ill. (j)], is one of the characteristic utterances which refresh the reader of De Gex, Macnaghten and Gordon's reports with a "gladsome light of jurisprudence" undreamt of by Coke.

Delay.—Where delay not amounting to a bar by any statute of limitations is pleaded as a defence to a suit for specific performance, the validity of that defence must be tried upon principles substantially equitable. "Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party, and cause a balance of

* (*h*) *Oxford v. Provan* (1868) L. R. 2 P. C. 135, 151.

S. R. A. justice or injustice in taking the one course or the other, so far as
S. 22. relates to the remedy" (j). In *Erlanger v. New Sombrers Phosphate Co.* (k), Lord Penzance said: "Delay, as it seems to be, has two aspects. Lapse of time may so change the condition of the thing sold, or bring about such a state of things that justice cannot be done by rescinding the contract subject to any amount of allowances or compensations. This is one aspect of delay.....But delay may also imply acquiescence.....It conduces, I think, to clearness and to the exclusion of a certain vagueness which is apt to hang about this doctrine of delay as a bar to relief, to keep these two different aspects of it separate and distinct when the consequences of delay come to be considered in connection with the circumstances of an individual case." Delay, however, should be specifically pleaded (l), and, further, if the point is not taken in the lower Courts, it will not be allowed to be raised for the first time in second appeal (m). Specific performance may be refused on the ground of delay even if time is not of the essence of the contract (n). Where a purchaser delayed payment of the purchase money of immovable property, insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold, it was held that as a right to such covenant was not shown, his delay of payment was not excused, and there was no case for decreeing specific performance (o).

What amount of delay will constitute a bar to relief by way of specific performance depends on the circumstances of each case. A delay of one month has never been held sufficient for this purpose (p). The shortest period which has been considered fatal is a delay of 3 months and 13 days as happened in *Glassbrook v. Richardson* (q). In the old case of *Marquis of Hertford v. Boore* (r), a delay

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| (j) <i>Lindsay Petroleum Co. v. Hurd</i> | (1903) 30 Cal. 265, 276-278. |
| (1874) L. R. 5 P. C. 221, 239. | (o) <i>Bindeshri Parshad v. Jairam</i> |
| (k) (1878) 3 App. Cas. 1218, 1231. | <i>Gir</i> (1887) 14 I. A. 173, 9 All. 705. |
| (l) <i>Peer Mahomed v. Mahomed Ebrahim</i> (1905) 29 Bom. 234. | (p) <i>Haradhan v. Bhagabati</i> (1914) |
| (m) <i>Mokund Lal v. Chotay Lal</i> | 41 Cal. 852, 862. |
| (1884) 10 Cal. 1061, 1069-1070. | (q) (1874) 23 W. R. (Eng.) 51. |
| (n) <i>Mohendra Nath v. Kali Proshad</i> , | (r) (1800) 5-Ves. 719. |

of 14 months was not considered a bar to the plaintiff's claim. On the other hand, a delay of about 18 months (s), of 21 months (t), and of three years and a half (u), was considered fatal in later cases. In an Allahabad case, a delay of 1 year and 8 months was held fatal (v). It may here be noted that the period of limitation for a suit for specific performance is 3 years from the date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused [Limitation Act, art. 113].

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In England, where the contract is substantially executed, and the plaintiff is in possession of the property, and has the equitable estate, so that the object of his action is only to acquire the legal estate, time either will not run at all as laches to debar the plaintiff from his right, or it will be looked at less narrowly by the Court (w). The reason is that the plaintiff has not been sleeping on his rights, but relying on his equitable title, without thinking it necessary to have his legal right perfected. It has accordingly been held that where a tenant holds under a contract for a lease, pays his rent, and has possession of the property and the enjoyment of all the benefits given to him by the contract, the lapse of time will not operate as a bar to its performance (x). The principle of these decisions was applied by the High Court of Calcutta in 1875. Certain shares in a company were allotted to one Seedat in 1860 on the understanding that on payment by the plaintiff to Seedat of the price thereof, Seedat should transfer them to the plaintiff's name. The plaintiff paid the price of the shares and received dividends from Seedat in respect of the said shares. After Seedat's death which took place in 1870, the plaintiff called upon his executor to transfer the shares to his name, but the executor refused. Upon these facts it was held in a suit by the plaintiff against the executor that the plaintiff was entitled to a decree for specific performance, and the

(s) *Southcomb v. Bishop of Exeter* (1848) 6 Harc. 213.

(t) *Lord James Stuart v. The London and North Western Ry. Co.* (1852) 1 De G. M. & G. 721.

(u) *Eads v. Williams* (1854) 4 De G. M. & G. 671 (where the contract was for a lease of a coal mine).

(v) *Nawab Begam v. Creet* (1905) 27 All. 678.

(w) *Per Lord Redesdale in Crofton v. Ormsby*, 2 Sch. & Lef. 583, 604.

(x) *Clark v. Moore*, 1 J. & L. 723; *Sharp v. Milligan* (1856) 22 Beav. 606; *Shepherd v. Walker* (1875) L. R. 20 Eq. 659.

S. R. A. executor was directed to transfer the shares to the plaintiff's
S. 22. name (y).

Case I: Unfair advantage.—Where the parties are not on equal terms, as where the defendant in entering into the contract is influenced by the idea that by doing so he would get rid of a criminal charge brought against him by the plaintiff, and the terms of the contract are such that a man would not agree to them unless under some pressure of circumstances, the Court should refuse specific performance (z). It is otherwise, however, where there is no such inequality between the parties (a). The mere fact that the terms of a bargain are onerous will not amount to "unfair advantage" within the first branch of this section in the absence of evidence of fraud or misrepresentation (aa). But we shall find under s. 28 that the present section does not exhaust the subject.

Case II: Hardship on the defendant.—"The question of the hardship of a contract is generally to be judged of *at the time at which it is entered into*; if it be then fair and just and not productive of hardship, it will be immaterial that it may be by the force of subsequent circumstances or change of events have become less beneficial to one party, except where these subsequent events have been in some way due to the party who seeks performance of the contract" (b).

"This clause clearly contemplates a case in which the vendor has entered into a contract without full knowledge of the circumstances. Instances of cases may be found in the books, where it has been held that mere improvidence or inadequacy is no hardship within the meaning of the rule, but that the bargain must be so hard as to be unconscionable, so that its actual performance would in the circumstances be inequitable. But where the hardship has been brought upon the defendant by himself, the Court will not consider that as a circumstance in favour of the refusal of specific performance" (c).

(y) *Ahmed v. Adjein* (1876) 2 Cal. 323.

(z) *Callianji v. Narsi* (1895) 19 Bom. 764, 769.

(a) *Shib Lal v. The Collector of Bareilly* (1894) 16 All. 423, 433.

(aa) *Davis v. Maung Shive Go* (1911) 38 Ind. App. 155.

(b) Fry, § 418; (1894) 16 All. 423, 435, *supra*.

(c) *Haradhan v. Bhagabati* (1914) 41 Cal. 852, 863.

(d) *For whom Contracts may be specifically enforced.*

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^{Who may obtain specific performance.} 23. Except as otherwise provided by this Chapter, the specific performance of a contract may be obtained by--

- (a) any party thereto ;
- (b) the representative in interest, or the principal, of any party thereto : provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed ;
- (c) where the contract is a settlement on marriage, or a compromise of doubtful rights between members of the same family, any person beneficially entitled thereunder ;
- (d) where the contract has been entered into by a tenant for life in due exercise of a power, the remainder man ;
- (e) a reversioner in possession, where the agreement is a covenant entered into with his predecessor in title and the reversioner is entitled to the benefit of such covenant ;
- (f) a reversioner in remainder, where the agreement is such a covenant, and the reversioner is entitled to the benefit thereof and will sustain material injury by reason of its breach ;
- (g) when a public company has entered into a contract and subsequently becomes amalgamated with another public company, the new company which arises out of the amalgamation ;

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S. 23.

(h) when the promoters of a public company have, before its incorporation, entered into a contract, for the purposes of the company, and such contract is warranted by the terms of incorporation, the company.

Nature of S. 23.—This section is really an enumeration of the kinds of parties, besides the actual contractors, who are entitled to sue on a contract. It involves no principle peculiar to the remedy of specific performance. On one or two points it is more definite than the corresponding English authorities, and therefore it seems to us that citation of those authorities would not be useful. We agree with Whitley Stokes that no reason appears why sub-sec. (c) should not have extended to all compromises of doubtful claims. As to the validity of compromises in general, see under s. 25 of the Contract Act, p. 188 above. It may be observed by way of caution that the enforcement of restrictive covenants by way of injunction does not come within this section.

Clause (a) : Party to the contract.—Where there is a joint contract, all must join in suing on the contract. Specific performance cannot be granted to some only of several purchasers, if others refuse to join in the suit (*d*).

Clause (b) : Representative in interest.—Where A. agreed to grant a lease to B. of a property which was at the date of the agreement in the possession of mortgagees, and B. agreed to undergo all the labour necessary for the conduct of a suit for redemption which was then pending and to pay all the expenses of the litigation, and the rent was to commence from the date on which possession was recovered from the mortgagees, it was held that the personal quality of B. was a material ingredient in the contract, and that his heir was not entitled to specific performance against A (*e*).

Clause (h) : Contract with promoters of a company.—A contract by a person with the promoters of a company to take a certain

(*d*) *Sa ur Rahman v. Maharamu* (1897) 24 Cal. 832; *Krishna-nessa Bibi* (1897) 24 Cal. 832; *Krishna-machari v. Ganganarau* (1882) 5 Mad. 29.
(*e*) *Mohendra Nath v. Kali Proshad* (1903) 30 Cal. 265, 275-276. As to "personal quality," see also *Vithoba v. Madhav* (1918) 42 Bom. 344, at p. 350.

number of shares of the company when formed is not a "contract for the purposes of the company" within the meaning of this clause, and allotment of shares to such a person by the company, if nothing is done by him amounting to an acceptance of the allotment, will not make him a shareholder or entitle the company to sue him for the unpaid calls on those shares (*f*). The suit, moreover, in such a case is not one for specific performance. See s. 27, cl. (c), as to the company's liability to be sued. In England the company's right to sue in such cases is said to be deduced, on the principle of mutuality, from its liability, (*g*).

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(e) *For whom Contracts cannot be specifically enforced.*

Personal bars
to the relief. **24.** Specific performance of a contract cannot be enforced in favour of a person —

- (a) who could not recover compensation for its breach ;
- (b) who has become incapable of performing, or violates, any essential term of the contract that on his part remains to be performed ;
- (c) who has already chosen his remedy and obtained satisfaction for the alleged breach of contract ; or

who previously to the contract, had notice that a settlement of the subject-matter thereof (though not founded on any valuable consideration) had been made and was then in force.

Illustrations —

to clause (a)—

A. in the character of agent for B., enters into an agreement with C. to buy C's house. A. is in reality acting not as agent for B. but on his own account. A. cannot enforce specific performance of this contract.

[See I. C. A., s. 236, p. 759, above.]

(*f*) *Imperial Ice Manufacturing Co.*, (*g*) *Fry, Sp. Perf.*, § 251.
Ld. v. Munchershaw (1889) 13 Bom. 415

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to clause (b)—

A. contracts to sell B. a house and to become tenant thereof for a term of fourteen years from the date of the sale at a specified yearly rent. A. becomes insolvent. Neither he nor his assignee can enforce specific performance of the contract.

[The insolvency need not have been judicially established, but there must be such proof of general insolvency as the Court can act on: *Neale v. Mackenzie* (1837) 1 Keen, 474, 44 R. R. 105.]

A. contracts to sell B. a house and garden in which there are ornamental trees, a material element in the value of the property as a residence. A. without B.'s consent, fells the trees. A. cannot enforce specific performance of the contract.

A. holding land under a contract with B. for a lease, commits waste, or treats the land in an unhusbandlike manner. A. cannot enforce specific performance of the contract.

A. contracts to let, and B. contracts to take, an unfinished house, B. contracting to finish the house and the lease to contain covenants on the part of A. to keep the house in repair. B. finishes the house in a very defective manner, he cannot enforce the contract specifically, though A. and B. may sue each other for compensation for breach of it.

[*Tildesley v. Clarkson* (1862) 30 Beav. 419, 132 R. R. 334; no disputeable law, a case purely on facts; one fails to see why it was reported.]

to clause (c)—

A. contracts to let, and B. contracts to take, a house for a specified term at a specified rent. B. refuses to perform the contract. A. thereupon sues for, and obtains, compensation for the breach. A. cannot obtain specific performance of the contract (*h*).

Matters of defence.—Note that, whereas s. 23 deals with general rules of procedure or title to sue, the sections from 24 to 26 inclusive declare special grounds of defence founded on the plaintiff's conduct. "The conduct of the party applying for relief is always an important element for consideration" (*i*).

If, in the illustration to clause (b) as to the ill-finished house (*j*), the lessee had entered and occupied before the lessor's work was done, it would be a question for the Court whether in all the circum-

(*h*) In *Whitley Stokes's Anglo-Indian Codes* a reference is here given by some mistake to a case which has nothing to do with the subject.

(*i*) *Lamarc v. Dixon* (1873) L. R. 6 H. L. 414, 423.

(*j*) The letters designating the lessor and lessee have gone wrong in the printed text of the Act; the lessor was to finish the house and the lessee to keep it in repair during his occupation.

stances his occupation implied such acquiescence in the lessor's performance of the contract as to debar him from finally refusing to perform it on his part (k). Such circumstances as continued protest and payment of rent under protest will exclude any presumption of acquiescence.

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For an example of the same kind of case being set up without success, the lessee having nothing better to show than "querulous letters, not unusual in building contracts" see *Orford v. Provand* (l).

Clause (d) is founded on a state of English law which has now been altered by legislation : see under the following section.

25. A contract for the sale or letting of property, whether movable or immovable, cannot be specifically enforced in favour of a vendor or lessor—

Contracts to sell property by one who has no title, or who is a voluntary settler.

- (a) who, knowing himself not to have any title to the property, has contracted to sell or let the same ;
- (b) who, though he entered into the contract believing that he had a good title to the property cannot, at the time fixed by the parties or by the Court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt ;
- (c) who, previous to entering into the contract has made a settlement (though not founded on any valuable consideration) of the subject matter of the contract.

Illustrations.

(a) A. without C.'s authority, contracts to sell to B. an estate which A. knows to belong to C. A. cannot enforce specific performance of this contract, even though C. is willing to confirm it.

(b) A. bequeaths his land to trustees, declaring that they may sell it with the consent in writing of B. B. gives a general prospective assent in

(k) Notes(i) on p. 910.

(l) (1868) L. R. 2 P. C. 135 (from the British settlement at Shanghai).

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writing to any sale which the trustees may make. The trustees then enter into a contract with C. to sell him the land. C. refuses to carry out the contract. The trustees cannot specifically enforce this contract, as, in the absence of B.'s consent to the particular sale to C., the title which they can give C. is, as the law stands, not free from reasonable doubt (m).

(c) A., being in possession of certain land, contracts to sell it to Z. On enquiry it turns out that A. claims the land as heir of B., who left the country several years before, and is generally believed to be dead, but of whose death there is no sufficient proof. A. cannot compel Z. specifically to perform the contract (n).

(d) A., out of natural love and affection, makes a settlement of certain property on his brothers and their issue, and afterwards enters into a contract to sell the property to a stranger. A. cannot enforce specific performance of this contract so as to override the settlement and thus prejudice the interests of the persons claiming under it.

Varieties of bad title.—The wording of clause (a) is not wholly clear. Knowing oneself not to have any title must be something more than being aware of some defect in the title: how much more? Does it include only the extreme case of a man contracting for the sale of property to which he has no present claim, on the mere chance of being able to acquire it? or does it cover the case of an imperfect title vitiated by some material defect which the vendor knows he has no means of making good? The English rule is that it is enough for a vendor suing for performance to be in a position to make a good title when he brings his action; but his does not justify wilful concealment of defects from the purchaser (o). Such concealment is of course fraud; moreover there is in every contract for sale of immovable property a duty to disclose material facts which is more stringently laid down, if anything, by Indian legislation than by English decisions (p).

A seller may and often does complete his title by procuring the concurrence of necessary parties; but it is another matter to offer the buyer a conveyance wholly proceeding from a party from whom he did not agree to buy. The Court will not compel a buyer to accept such a conveyance, for it would be forcing a new contract

(m) The present writer knows of no authority for holding such a general consent in advance to be good. (o) *Adams v. Brooke* (1842) 1 Y. & C. C. 627, 57 R. R. 480.

(n) Obviously A. has not made out his title. (p) Transfer of Property Act, s. 55.

on him ; it is one thing to join a mortgagee or the like in the vendor's conveyance, another thing to substitute a new vendor (q). S. R. A. S. 25.

A seemingly doubtful point is whether this clause applies in the event of the buyer electing to affirm the contract with full knowledge of the facts, and afterwards refusing performance for some other reason.

It must be remembered that in England, owing to the complications of land law and tenure, almost all sales of real estate are subject to special conditions limiting the objections that may be taken by the purchaser and the time within which they must be taken. Very few English vendors can be advised to believe that they have a good title in the sense of having a "marketable" title which a purchaser can be compelled to accept without conditions. Minor defects, on the other hand, mostly cure themselves by lapse of time. In practice it is found that, where there is no reason to suspect any really fatal defect, pretty stringent conditions can be imposed without any sensible prejudice to the sale.

As to cases where the original acceptance of the contract is expressed to be subject to approval of the title on the buyer's part, see p. 50 above.

"A doubtful title".—Clause (b) follows English law. "The Court will not force a doubtful title on a purchaser" is the common way of stating the rule. It has very long, though not always, been the practice of courts of equity not to compel a purchaser to fulfil his contract when the title is open to so much and such plausible objection that, even though on full argument it might turn out to be good, to buy such a title would be to risk buying a law suit. Where for example a title depends on a really hard question of construction which the Court can determine in another appropriate form of procedure, a suit for specific performance is not the right way to raise it, and the vendor will probably lose his costs even if in one way or another he turns out to be in the right on the point in question (r). The discretion as to costs, it may be observed, could still be usefully exercised even if the Court were bound to give a positive decision on the title in the proceeding between buyer and seller and the rule

(q) *Bryant and Barningham's Con-*
tract (1890) 44 Ch. Div. 218.

(r) *Nichols' and Von Joel's Con-*
tract [1910] 1 Ch. 43, C. A.

- S. R. A. itself has not escaped criticism. Every title must be good or bad, that
 S. 25. is, it must satisfy or fail to satisfy the conditions of the contract (s).
 Why should the Court decline to make up its mind? There would be no answer to this criticism under a system of officially authenticated title. In England, however, some titles may be and are doubtful to the point of appearing good to some very learned persons and bad to others. Moreover (and this is perhaps the best reason for the rule) a decision between vendor and purchaser is not binding on any third party who might have an adverse claim (t).

There has been considerable discussion as to the kind and amount of objections that will make a title too doubtful to be forced on a purchaser. Obviously no complete definition is possible. It might have conduced to clearness if it had always been remembered that, apart from statutory provisions which in England are compulsory only to a very limited extent, and, between the extreme cases of practically immemorial continuity in a regular succession and bare-faced pretence of ownership by an imposter not having even a possessory title, there is no such thing as an absolutely good or bad title. A vendor seeking specific performance is bound to prove his title, subject to such admissions, waivers of inquiry, and acceptance of less than strict proof as the purchaser has agreed to by the terms of the contract. If the proof does not come up to that mark, the title is, as between the parties, not doubtful but bad. Such is the case, for example, when the vendor was formerly a trustee for sale of the property he is now dealing with and bought it for himself, and fails to produce any sufficient evidence that he did so with the knowledge and consent of the beneficiaries and the nature of the case is not altered if the judgment employs old-fashioned phrases and says, "it would be inequitable to force such a title as this upon" the purchaser (u).

From this point of view, which it is submitted is the sound one, there cannot be any large proportion of cases in which the Court

(s) The decree made at the trial of a specific performance suit is conclusive as to the terms of the contract, and evidence that the purchaser was aware of a material defect is not admissible in an inquiry as to title following

the decree: *McGrory v. Alderdale Estate Co.* [1918] A. C. 503.

(t) See per Jessel, M. R., *Osborne to Rowlett* (1880) 13 Ch. D. 774, 781.

(u) *Williams v. Scott* [1900] A. C. 499, 508.

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is of opinion that the vendor has satisfied the burden of proof, and yet thinks that a judicial pronouncement of that opinion would still leave the buyer exposed to such risk of adverse claims, or of difficulties if he is hereafter minded to become a seller, as a prudent buyer cannot reasonably be expected to undertake. In common practice judicial approval of a title is accepted as sufficient even when the question decided was of admitted difficulty (v). There are exceptional cases however in which the Court may really feel doubtful; a judge of first instance, in presence of unreconciled differences or ambiguities in the dicta of an appellate Court, is in that position. "The Court must feel such confidence in its own opinion as to be satisfied that another Court would not adopt another conclusion" (w). Therefore the existence of apparently conflicting decisions has been regarded as a sufficient ground of doubt even in the Court of Appeal (x).

It has happened in the case of a title dependent not on any general principle of law, but on the construction of a particular will that a very learned judge expressed his own opinion in favour of the title and yet thought the question too doubtful to justify him in decreeing specific performance, but eighteen years later another judge, with a contract for sale of property under the very same title before him, agreed with his predecessor's opinion, regretted his decision as over-cautious, and held that there was no sufficient reason for refusing specific performance (y). It is possible that both decided rightly.

By this time the learned reader may probably have concluded that this rule of equity jurisprudence, like some others we have had occasion to discuss or mention, could not have arisen except in connection with the peculiar relations of Chancery to Common Law jurisdiction in England, and the anxiety of Chancery judges to keep

(v) The present writer had occasion to be acquainted (not professionally) with a case where a purchaser was ill-advised enough to dispute a decision of Sir G. Jessel's on which the title rested. Chitty, J., followed that decision without hesitation.

(w) Chitty, J., *Thackuray and Young's Contract* (1888) 40 Ch. D. 34,

39 (the question was on the construction of a provision in a Railway Company's Act as to superfluous lands).

(x) *Palmer v. Locke* (1881) 18 Ch. Div. 281.

(y) *Pyrke v. Waddingham* (1852) 10 Hare 1, 90 R. R. 243; *Mullings v. Trinder* (1870) L. R. 10 Eq. 449.

- J. R. A. on good terms with the Common Law by being astute not to decide
 S. 25. a purely legal question if they could help it. Having come to this conclusion, he may perhaps doubt whether the importation of such a rule into India was at all necessary, or very wise.

In modern English practice difference of judicial opinions, or a reasonable apprehension thereof, seems to be the only accepted ground for the kind of doubt now in question (z).

When clause (a) was enacted, a conveyance without valuable consideration was by the law of England voidable at the suit of a supervening purchaser for value, even with notice, under a sixteenth century statute as construed by the Courts; but now it cannot be so defeated (a).

Illustrations (b) and (c) are illustrations of clause (b). The following are additional illustrations :—

(1) N. mortgages his property to V. in 1880. N. and V. sell the property in 1882 to C., but the sale-deed is not registered. N. dies in 1883 leaving a will of which V. is the executor. In 1885 C. sells the property to H. V., who has not obtained probate of N.'s will, joins in the sale both in his own right and as executor of N. In 1888 H. agrees to sell the property to M. H. cannot specifically enforce this contract as the sale-deed of 1882 not having been registered, the equity of redemption remained in N. up to the time of his death. On his death, it passed to his executor V., but V. not having obtained probate of N.'s will, he could not make a valid transfer of the equity of redemption, though he joined in the sale to H. N.'s heir could therefore sue the person in possession for redemption, and the title cannot therefore be said to be free from reasonable doubt : *Haji Mahomed Miha v. Musaji Esaji* (1891) 15 Bom. 657.

(2) M. agrees to sell his property to S. in 1913. One of the terms of the agreement is that M. shall deduce "a marketable title to the property free from all reasonable doubts." In the course of the investigation of title it transpires that one of M.'s predecessors in title had in 1892 mortgaged the property to D. and G. This mortgage

(a) See Fry on Specific Performance, 5th ed., 438.

(a) Voluntary Conveyances Act, 1893, 56 & 57 Vict. c. 21.

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was effected by a deposit of the title-deeds of the property (one of which M. failed to produce), and by a memorandum of charge duly registered. There was no reconveyance from D. and G., but a release executed by G. alone whereby after reciting that D. had died leaving G. as his sole heir, and that the mortgage debt had been paid off by the mortgagor to G., G. released the property from the mortgage. There is no evidence to show that at the date of the release G. was the sole heir of D. This is not a title free from reasonable doubt, for if at the date of the release there was another heir of D., neither the release nor the recitals therein being binding on him, he could seek to enforce the mortgage. Nor can it be said that his right to do so was barred by limitation, for assuming the period of limitation to be 12 years only under art. 132 of the Limitation Act, it is perfectly possible that there have been payments on account of the principal or interest secured by the equitable charge which would preclude the operation of the statute: *Shrinivasa v. Meherbai* (1917) 44 I. A. 36, 41 Bom. 300. [There is no distinction between the expression "title free from reasonable doubt" as used in this section and the expression "marketable title free from all reasonable doubts" used in the agreement in this case.]

Such title as the vendor has.—The condition that the purchaser shall take such title as the vendor has, imports that the vendor has some title, however defective it may be. Hence if the vendor has no title at all, as where the vendor is a mortgagee and the mortgage is executed by one who was not the owner of the property, the vendor is not entitled to specific performance (b).

On the other hand, where a vendor agrees to sell "both myst bungalows described above, including the sites and buildings together with the compounds, out-houses, etc.," he agrees to sell not a mere revocable license to occupy the land, but the land itself. The purchaser, therefore, will be justified in refusing to complete the purchase, unless he knew what the real tenure of the land was (c).

(b) *Motivahoo v. Vinayak* (1888) 21 Bom. 827, 857-858 [F. B.]; *Shiv v. Bai* (1902) 26 Bom. 519; *Gangadi v. Kasinath* (1872) 9 Beng. L. R. 1.
12 Bom. 1.

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(f) *For whom Contracts cannot be specifically enforced, except with a Variation.*

26. Where a plaintiff seeks specific performance of a contract in writing, to which the defendant sets up a variation, the plaintiff cannot obtain the performance sought, except with the variation so set up, in the following cases (namely):—

Non-enforcement
except with varia-
tion.

- (a) where by fraud or mistake of fact the contract of which performance is sought is in terms different from that which the defendant supposed to be when he entered into it ;
- (b) where by fraud, mistake of fact, or surprise the defendant entered into the contract under a reasonable misapprehension as to its effect as between himself and the plaintiff ;
- (c) where the defendant, knowing the terms of the contract and understanding its effect, has entered into it relying upon some misrepresentation by the plaintiff, or upon some stipulation on the plaintiff's part which adds to the contract, but which he refuses to fulfil ;
- (d) where the object of the parties was to produce a certain legal result, which the contract as framed is not calculated to produce ;
- (e) where the parties have, subsequently to the execution of the contract, contracted to vary it.

Illustrations.

(a) A., B. and C. sign a writing by which they purport to contract each to enter into a bond to D. for Rs. 1,000. In a suit by D., to make A., B. and C. separately liable each to the extent of Rs. 1,000, they prove that the word "each" was inserted by mistake; that the intention was that they should give a joint bond for Rs. 1,000. D. can obtain the performance sought only with the variation thus set up.

[*Gordon v. Hertford* (1817) 2 Mad. 106, 17 R. R. 195.]

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S. 28.

(b) A. sues B. to compel specific performance of a contract in writing to buy a dwelling-house. B. proves that he assumed that the contract included an adjoining yard, and the contract was so framed as to leave it doubtful whether the yard was so included or not. The Court will refuse to enforce the contract, except with the variation set up by B.

[*Cp. Denny v. Hancock* (1870) L. R. 6 Ch. 1, where the plan furnished by the seller was misleading.]

(c) A. contracts in writing to let to B. a wharf, together with a strip of A.'s land delineated in a map. Before signing the contract, B. proposed orally that he should be at liberty to substitute for the strip mentioned in the contract another strip of A.'s land of the same dimensions, and to this expressly assented. B. then signed the written contract. A. cannot obtain specific performance of the written contract, except with the variation set up by B.

[*Clarke v. Grant* (1807) 14 Ves. 519, 9 R. R. 336.]

(d) A. and B. enter into negotiations for the purpose of securing land to B. for his life, with remainder to his issue. They execute a contract, the terms of which are found to confer an absolute ownership on B. The contract so framed cannot be specifically enforced.

[As the case is stated, there is no contract at all.]

(e) A. contracts in writing to let a house to B. for a certain term, at the rent of Rs. 100 per month, putting it first into tenantable repair. The house turns out to be not worth repairing, so, with B.'s consent, A. pulls it down and erects a new house in its place: B. contracting orally to pay rent at Rs. 120 per mensem. B. then sues to enforce specific performance of the contract in writing. He cannot enforce it except with the variations made by the subsequent oral contract.

[This would be so in England, but only on the ground that A. has acted and incurred expense on the faith of the variation, as explained in *Price v. Dyer* (1810) 17 Ves. 356, 364, 11 R. R. 102, 106.]

Clauses (a), (b) and (c).—These have been taken verbatim from Mr. Dart's book on Vendors and Purchasers, 5th ed., p. 1039.

Clause (e): Variation of contract.—In a Calcutta case (d) B. by a writing agreed to sell his property to C. on "certain conditions agreed upon." C. sued B. for specific performance. B. alleged that the said conditions were arranged orally, one of them being that upon execution of the conveyance C. should execute a lease to B. of the property for three years. Wilson, J., held that oral evidence of the arrangement was not admissible having regard to the provisions of s. 92 of the Evidence Act. On appeal it was held by Garth, C.J., and Pontifex, J., that such evidence was admissible; and

(d) *Cutts v. Brown* (1881) 6 Cal. 328.

S. R. A. rightly, for s. 92 of the Evidence Act does not affect the possibility
 is. 26, 27. of the original and only agreement being partly in writing and partly
 not. But Garth, C.J., said: "I quite agree with my brother
 Pontifex that s. 26 of the Specific Relief Act is intended to provide
 for just such a case as the present." It is submitted, with respect,
 that cl. (e) of the present section is not to the purpose. The clause
 refers to variations *subsequent* to the execution of the contract, while
 in the case before the Court no such variation was alleged. The
 agreement showed on the face of it that besides the terms set forth
 in it, there were other terms *already* agreed upon between the parties.

Where section does not apply.—A., who is B.'s guardian,
 agrees to sell to C. certain property belonging to B. for Rs. 763, subject
 to the leave of the Court. The sale is sanctioned by the Court not
 for Rs. 763, but for Rs. 800. C. is not entitled to a transfer of the
 property on payment of Rs. 763, for though the sale is sanctioned
 by the Court, it is sanctioned for Rs. 800. S. 26 does not apply to
 such a case (e).

(g) *Against whom Contracts may be specifically enforced.*

Relief against
 parties and persons
 claiming under
 them by subse-
 quent title.

27. Except as otherwise provided by
 this Chapter, specific performance of a
 contract may be enforced against—

- (a) either party thereto ;
- (b) any other person claiming under him by a title
 arising subsequently to the contract, except
 a transferee for value who has paid his money
 in good faith and without notice of the original
 contract ;
- (c) any person claiming under a title which, though
 prior to the contract and known to the plain-
 tiff, might have been displaced by the defendant ;
- (d) when a public company has entered into a con-
 tract and subsequently becomes amalgamated
 with another public company, the new com-
 pany which arises out of the amalgamation ;

- (e) when the promoters of a public company have, before its incorporation, entered into a contract, the company: provided that the company has ratified and adopted the contract and the contract is warranted by the terms of the incorporation.

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Illustrations—

to clause (b)—

A. contracts to convey certain land to B. by a particular day. A. dies intestate before that day without having conveyed the land. B. may compel A.'s heir or other representative in interest to perform the contract specifically.

A. contracts to sell certain land to B. for Rs. 5,000. A. afterwards conveys the land for Rs. 6,000 to C., who has notice of the original contract. B. may enforce specific performance of the contract as against C.

[*Potter v. Sanders* (1846) 6 Ha. 1, 77 R. R. 1.]

A. contracts to sell land to B. for Rs. 5,000. B. takes possession of the land. Afterwards A. sells it to C. for Rs. 6,000. C. makes no inquiry of B. relating to his interest in the land. B.'s possession is sufficient to affect C. with notice of his interest, and he may enforce specific performance of the contract against C.

[*Daniels v. Davidson* (1809) 16 Ves. 249, 17 Ves. 433, 10 R. R. 171.]

A. contracts, in consideration of Rs. 1,000, to bequeath certain of his lands to B. Immediately after the contract A. dies intestate, and C. takes out administration to his estate. B. may enforce specific performance of the contract against C.

A. contracts to sell certain land to B. Before the completion of the contract, A. becomes a lunatic and C. is appointed his committee. B. may specifically enforce the contract against C.

to clause (c)—

A., the tenant for life of an estate, with remainder to B., in due exercise of a power conferred by the settlement under which he is tenant for life, contracts to sell the estate to C., who has notice of the settlement. Before the sale is completed A. dies. C. may enforce specific performance of the contract against B.

[*Re Dykes' Estate* (1869) L. R. 7 Eq. 337: the point there was that the Court treated the agreement as equivalent to a formal execution of the power.]

A. and B. are joint tenants of land, his undivided moiety of which either may alien in his life time, but which, subject to that right, devolves on the survivor. A. contracts to sell his moiety to C. and dies. C. may enforce specific performance of the contract against B.

S. R. A. Contents of the section.— S. 27 is a counterpart of s. 23, enumerating classes of possible defendants to a specific performance suit who were not original parties to the contract, as that section enumerated classes of possible plaintiffs. The rules here given for convenience exhibit no common ground of principle and little, if any, of practice belonging to actions for specific performance more than to other forms of proceeding. Clause (c) is so worded as to be barely intelligible without the illustrations. The word ‘defendant’ at the end stands, in point of sense, for some such words as ‘original contracting party from whom that title is derived.’ The rule is a consequence of the equitable doctrine which regards a purchaser as acquiring, as soon as the contract is complete, the rights of an owner against the vendor and all persons not being purchasers for value without notice of the contract, and not claiming under an independent title adverse to the vendor’s. English cases are mostly of little use for illustration; the principle is assumed and the discussion turns on some complication introduced by special circumstances.

Clause (d) appears to ignore the accepted doctrine as to novation; it does not say however that the original debtor company (which may survive a pretty long time for the purpose of winding up) is released without the assent of the creditor, which would indeed be a startling new departure.

The liability declared in clause (c) was established in England in the course of the 19th century by decisions given in courts of equity “partly on the ground of a distinct obligation having either been imposed on the company in its original constitution, or assumed by it after its formation, partly on a ground independent of contract and analogous to estoppel, namely that where any person has on certain terms assisted or abstained from hindering the promoters of a company in obtaining the constitution and the powers sought by them, the company when constituted must not exercise its powers to the prejudice of that person and in violation of those terms” (f). This doctrine applies only where the company has become expressly bound or has taken the benefit of the terms made with the promoters; the present section says “ratified *and*”—not *or*—“adopted the

(f) Pollock on Contract, p. 214, 8th ed.

contract"; if this were construed to require express ratification the Indian rule would be narrower than the English. It seems to be assumed, however, that the intention was to re-affirm the rule as laid down in England (g). Sir Edward Fry's statement is that "the company itself, after incorporation, must either have taken the benefit of the contract, or have otherwise recognized it as a contract binding on them," and "the contract must be for something warranted by the terms of the incorporation." His own opinion agrees with judicial dicta suggesting that the doctrine has gone quite far enough if not too far (h).

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Indian authorities: Clause (b): purchase with notice of prior agreement for sale.—This clause contains provisions similar to those of s. 40 of the Transfer of Property Act and s. 91 of the Indian Trusts Act. See notes to s. 3 above, under the head "III. (g)."

In the case put in the second illustration to cl. (b), B.'s right to enforce specific performance of his contract as against C. will not be affected, although the sale-deed to C. may have been registered and although he has obtained possession under his purchase (i).

The principle upon which the third illustration to cl. (b) proceeds is that "the occupation of property by a tenant ordinarily affects one who would take a transfer of that property with notice of that tenant's rights, and if he chooses to make no inquiry of the tenant, he cannot claim to be a transferee without notice" (j). But occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property (k).

It has been held by the High Court of Calcutta that mere registration of the original contract for sale is not sufficient notice of a contract within the meaning of this clause (l). It would, it seems,

(g) See the dictum in *Imperial Ice Manufacturing Co. v. Munchershaw* (1889) 13 Bom. 415, 423.

(h) Fry on Sp. Perf. §§ 250-255.

(i) *Chunder Kant Roy v. Krishna Sunder* (1884) 10 Cal. 710; *Kannan v. Krishnan* (1890) 13 Mad. 324; *Namasivayam v. Nallayappa* (1895) 18 Mad. 43; *Hurnandun Singh v. Jawad Ali* (1900) 27 Cal. 468; *Himatlal v.*

Vasudev (1912) 36 Bom. 446, 450-451; *Nanbat Rai v. Dhaunkal Singh* (1916) 38 All. 184.

(j) *Baburam Bag v. Madhab Chandra* (1913) 40 Cal. 565, 569.

(k) *Manji v. Hoorbai* (1911) 35 Bom. 342, 348-349.

(l) *Preonath v. Ashutosh* (1900) 27 Cal. 358.

S. R. A. be held the same way in Madras (m), but differently in Bombay (n) ss. 27, 28. and Allahabad (o).

Where a person claims to be a transferee for value without notice of the original contract, the burden lies upon him to prove that he fulfils that character (p). And in this connection it must be noted that notice before actual payment of the whole of the purchase money, even although it may have been secured, or before the conveyance is actually executed, is binding in the same manner as notice had before the contract (q).

A. contracts to sell certain land to B. for Rs. 5,000. A. afterwards conveys the land for Rs. 6,000 to C., who has notice of the original contract, and puts C. in possession of the land. B., not knowing of the transfer to C., sues A. and obtains a decree for specific performance against him. This does not bar a suit by B. against C. for specific performance and for possession (r).

Cl. (b) applies not only to sales, but to leases (s).

(h) *Against whom Contracts cannot be specifically enforced.*

28. Specific performance of a contract cannot be enforced against a party thereto in any of the following cases :—

What parties cannot be compelled to perform.

(a) if the consideration to be received by him is so grossly inadequate, with reference to the state of things existing at the date of the contract, as to be either by itself or coupled with other circumstances evidence of fraud or of undue advantage taken by the plaintiff ;

(m) See *Shan Maun Mull v. Madras Building Co.* (1892) 15 Mad. 268.

(n) See *Lakshmandas v. Dasrat* (1882) 6 Bom. 168.

(o) See *Janki Prasad v. Kishen Dat* (1894) 16 All. 478.

(p) *Himatlal v. Vasudev* (1912) 36 Bom. 446; *Baburam Bag v. Madhab Chandra* (1913) 40 Cal. 565, 569.

(q) *Himatlal v. Vasudev* (1912) 36 Bom. 446, 451.

(r) *Gaffur v. Bhikaji* (1902) 26 Bom. 159.

(s) *Baburam Bag v. Madhab Chandra* (1913) 40 Cal. 565. See also *Kameswaramma v. Sitaranuja* (1906) 29 Mad. 177 [mortgage].

- (b) if his assent was obtained by the misrepresentation (whether wilful or innocent), concealment, circumvention or unfair practices, of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled ;
- (c) if his assent was given under the influence of mistake of fact, misapprehension or surprise : Provided that, when the contract provides for compensation in case of mistake, compensation may be made for a mistake within the scope of such provision, and the contract may be specifically enforced in other respects if proper to be so enforced.

Illustrations—

to clause (c)—

A., one of two executors, in the erroneous belief that he had the authority of his co-executor, enters into an agreement for the sale to B. of his testator's property. B. cannot insist on the sale being completed.

[*Sneesby v. Thorne* (1855) 7 D. M. & G. 399, 109 R. R. 186.]

A. directs an auctioneer to sell certain land. A. afterwards revokes the auctioneer's authority as to 20 bighas of this land, but the auctioneer inadvertently sells the whole to B., who has not notice of the revocation. B. cannot enforce specific performance of the agreement.

[Simplified from *Manser v. Back* (1848) 6 Ha. 443, 77 R. R. 187.]

Defects of the section.—This section is incongruous, misplaced, and altogether an unsatisfactory piece of work. If it means more than an exhortation to administer the remedy now in question on the principles declared in the Contract Act, ss. 15-22 ; if it purports to confer on the Court a discretion to apply, for this purpose, a standard different from that of the general law ; and if, in particular, I. C. A., s. 22, is to be considered inapplicable in suits for specific performance—then it ought not to have been mixed up with provisions relating merely to procedure, but, as materially enlarging the discretion of the Court, should have followed s. 22 of the present Act and should have made the intention more explicit. It looks as if the draftsman had forgotten the last-named section as

- S. R. A. well as the Contract Act, and had also copied phrases from some text
 S. 28. book without adverting to the differences between failure to form any real agreement, formation of a voidable contract (but valid until rescinded), and formation of a contract on which damages may be recoverable but of which specific performance will not be granted. The illustrations consist of two very special cases from English reports and throw no light on the general intention of the section.

Apparently there still were, about forty years ago, learned persons who did not understand that a code cannot be made by cutting up even the best text-books. But the text-books then available were written under the old system of divided jurisdiction, when a Chancery judge had to be constantly saying, in more or less veiled language: "It would be imprudent and impertinent for me to deny that you may have a cause of action in a common-law Court: That is no business of mine. What I can and do tell you here is that you cannot have specific performance." For such an attitude there is now no occasion, and survivals of it ought not to be allowed to haunt modern expositions of the law.

The second illustration is not very lucid as it stands; in the case from which it is abridged the fact was that immediately before the sale the seller's solicitor found that a reservation of considerable importance had been omitted from the printed particulars; a certain number of copies were, by his direction, corrected and placed in the auction room, and the auctioneer read out the particulars so corrected; but the buyer who was plaintiff in the suit denied that he heard the alteration, and in fact the memoranda signed by the plaintiff and the auctioneer were on uncorrected copies; the auctioneer said this was by his own inadvertence. The Court pointed out that the auctioneer should have given more distinct notice of the alteration, accepted the buyer's statement that it did not in fact come to his notice, and, after referring to authorities on mistake, added that the strongest ground of defence for the seller was that the auctioneer had no authority to sell except according to the altered particulars, and therefore could not bind his principals to a contract omitting the reservation. That being so, the offer accepted by the purchaser was not the vendor's offer. *Manser v. Back* (see note to the second illustration) has been criticized as a very strong

decision, but it has been followed in our own time (*t*) and on an earlier S. R. A. occasion cited with approval though not as being exactly in point (*u*). Ss. 28, &

Finally, this section appears to overlap to an undefined extent the provisions of heads (I) and (II) of s. 22. One is tempted to wonder whether it was not an afterthought interpolated by some hand foreign to the original design. We must be content that it is not known to have done any harm.

Inadequacy of consideration.—The rule observed in England until the passing of Stat. 31 Vic., c. 4, not to decree specific performance of an agreement to sell a reversionary interest when the purchase money was less than the market value of the reversion, is not the rule in India. "No mention of it is to be found in the Specific Relief Act, and, if it had been intended to give effect to it, we should have expected to find it in section 28 of the Act" (*v*).

(i) *The effect of dismissing a Suit for Specific Performance.*

29. The dismissal of a suit for specific performance of a contract or part thereof shall bar the plaintiff's right to sue for compensation for the breach of such contract or part, as the case may be.

Bar of suit for breach after dismissal.

Compensation.—Where specific performance or injunction is refused on the ground that damages are the proper remedy, the Court should itself award damages, though no damages be asked for in the plaint. "In England, no doubt, a bill in equity would have been dismissed, but then the plaintiff would have his suit at law for damages. Here, however, a new suit would not lie, and consequently when the plaintiff is held entitled to a remedy, the appropriate remedy should be awarded" (*u*). As to the power of the Court to award compensation, see s. 19 above.

(*t*) *Hare and O'More's Contr.* [1901] 1 Ch. 93, a case of misdescription in printed particulars corrected at the sale by word of mouth.

(*u*) *Tamplin v. James* (1880) 15 Ch. D. 215, 217, by Baggeallay, L.J., sitting in first instance: with great

respect it is difficult to see what *Manser v. Back* has to do with ambiguity.

(*v*) *Gilabai v. Balaji* (1892) 17 Bom. 232.

(*w*) *Callianji v. Narsi* (1895) 19 Bom. 764, 770

S. R. A.

(j) *Awards and Directions to execute Settlements.*

S. 30.

Application of preceding sections to awards and testamentary directions to execute settlements.

30. The provisions of this Chapter as to contracts shall, *mutatis mutandis*, apply to awards and to directions in a will or codicil to execute a particular settlement.

Awards and testamentary directions to execute settlements.—This is according to English practice as long settled. Inasmuch as the duty of performing an award arises from the contract of the parties to submit the difference to arbitration, there is no reason why the matter of an award should not be a fit subject for a decree of specific performance, provided that a direct agreement to the same effect would have been so. The award must of course be conformable to the arbitrator's authority. Testamentary directions to execute a settlement operate in English law by way of creating a trust and are not considered under the head of specific performance, though the Court does, in the course of administering estates and otherwise, direct them to be specifically carried out. But in one sense all equitable jurisdiction rests on the power of issuing specific orders.

Limitation.—There is a conflict of opinion whether a suit to enforce the terms of an award is a suit for specific performance governed by art. 113 of the Limitation Act which provides a period of 3 years, or is governed by the residuary article 120 which provides a period of 6 years. On the one hand, it has been said that by reason of the operation of the present section, a suit for the specific performance of the terms of an award should be regarded as a suit for the specific performance of a contract. On the other hand, the opinion has been expressed that all that the present section lays down is that when the question is one of specific performance, the Court has the same powers, and should proceed upon the same principle, in the case of an award as in the case of a contract (x); and a suit to enforce the award will not be a suit for specific performance of a contract unless such is the express purport of the award. Even in that case it might well be held that what the Court enforces is still the award, not the contract on which the original claim was founded

(x) See the cases collected in *Kuldip Dube v. Mahaul Dube* (1912) 34 All. 43. See also *Fardunji v. Jamsedji* (1904) 23 Bom. 1.

nor yet the contract of submission to arbitration. The latter view, it is submitted, is correct. It is in accordance with the practice observed by the Court of Chancery in England in decreeing specific performance of awards. The jurisdiction of the Court in these cases not being any jurisdiction peculiar to awards, but its ordinary jurisdiction applicable to agreements, many, if not all, of the principles applicable to ordinary cases or suits for the specific performance of agreements applied to the specific performance of awards (y). This jurisdiction was founded on the principle that "when parties have agreed to submit their differences to the determination of a third person, and to abide by any orders or regulations which he may make, his decision and the regulations and orders which he may prescribe, constitute the agreement of the parties, and it is for the purpose of enforcing that agreement that this Court interferes to enforce and give effect to the award" (z). As to the form of a suit on an award, see the Code of Civil Procedure, Sec. I, App. A, form No. 10.

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S. 30.

CHAPTER III.

OF THE RECTIFICATION OF INSTRUMENTS.

Rectification: introductory.—Secs. 31, 32, 33 were improvidently copied from arts 1899-1901 of the Draft Civil Code of New York, and are a fair sample of the loose thinking and bad workmanship which pervade that unhappy experiment. "Mutual mistake for 'counon'" in s. 31 is bad English (though rather frequent in modern reports and text books) and the mixing up of fraudulent interpolation or alteration with failure to carry out instructions in proper form, whether by incompetence, by innocent misunderstanding, or by mere accidental error, is inelegant and, but for sound English tradition being already established, might easily have led to inconvenient consequences.

The principles on which the Courts act in England are in themselves quite simple: the difficulties, when they occur, are of evidence or construction. In a proper case the Court will amend

(y) *Nickels v. Hancock* (1855) 7 De G. M. & G. 300, 314, per Knight Bruce, *supra*, per Turner, L. J.
L.J.

(z) *Nickels v. Hancock*, p 317,

S. R. A.
Ch. III.

the language of an instrument for the purpose of making it accord with the true intention of the parties, having ascertained what that intention was as also that the words as they stand fail to express it. Rectification cannot be adjudged unless the Court is satisfied on both these points. "There can be no rectification where there is not a prior actual contract by which to rectify the written document" (a).

There is no need, it should be observed, to invoke this jurisdiction in case of such verbal slips or omissions as are obvious on the face of the writing and can be corrected by the context alone. The remedy of these minor blunders is within the Court's ordinary function of construing the expressions used. Even a missing clause can be supplied in an instrument of a well known form if the sense clearly requires it (b).

Where the instrument finally executed is in conformity with a previous written agreement of the parties, but there was error in the expression of that agreement, it seems that evidence of the intention of the parties cannot be admitted to rectify the final instrument alone. With great respect for certain critical observations of Neville, J., (c) who acted on this rule but did not approve it on principle, it appears to be correct; for the error was in the preliminary agreement, and if both writings cannot be rectified neither can be. This reason is independent of the authorities on specific performance with variations (d), and it is not necessary to contest Neville, J.'s argument that those authorities are not properly applicable to rectification.

As there must be clear and satisfactory proof both of the real common intention and the departure from it in the document which the plaintiff seeks to rectify (e), it has been the usage of English courts of equity not to grant rectification of a written instrument on oral evidence alone when the alleged mistake is positively denied by the defendant. On the whole this appears to be a habit of judicial prudence rather than a positive rule of evidence (f).

(a) Fry on Specific Performance, § 1 Ch. 550, 561.
791.

(d) See on s. 26 above.

(b) See e.g. *Redfern v. Bryning* (1877)
6 Ch. D. 133; *Burchell v. Clark* (1876)

(e) *Fowler v. Fowler* (1859) 4 De
G. & J. 250, 124 R. R. 234.

2 C.P. Div. 88 (reference to counterpart).

(f) Authorities collected in Pollock

(c) *Thompson v. Hickman* (1907)

on Contract, 8th ed., 545.

It is a sufficient reason for rectifying an instrument that it is so unskillfully framed as to raise a serious doubt whether it expresses the true intention; the Court, being satisfied that the expression as it stands is obscure and may be misleading, may proceed to reform it so as to make it plain, without undertaking to decide how it would be construed if the question of rectification were not raised (*g*).

S. R. A.
Ch. III,
S. 31.

In most cases of rectification the proximate origin of the mistake lies in the carelessness or want of skill of the draftsman employed; but if, exceptionally, one of the parties, by negligence, or to conceal some fact he does not wish to disclose (not to speak of downright fraud), has caused the instrument to be so framed as to defeat the intention, known to himself, of the other party or parties, the party so in fault cannot be heard to say that his own intention was different. Cases of this kind are likely to be on the verge of fraud or undue influence (*h*).

As to s. 32 we must confess that we do not understand what meaning the framers of the New York draft Civil Code attached to it or on what authority they supposed it to be founded. If they mean only that the agreement according to which an instrument is to be rectified must be a lawful and valid agreement, such as the Court would enforce if directly sued upon, it was idle to lay down that truism in vague and pompous language; if not, they failed to express with any certainty what more they did mean.

Sec. 33 is unnecessary in any jurisdiction where the Court is free to exercise common sense, but there is no harm in it.

31. When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative

When instrument may be rectified.

(*g*) *Walker v. Armstrong* (1856) 8 D. M. & G. 531, 114 R. R. 234, a case of gross professional incompetence on the draftsman's part. The judgment of Knight Bruce, L.J., is no less amusing than instructive.

(*h*) *Lovejoy v. Smith* (1880) 15 Ch. D. 655; *Whiteley v. Delaney* [1913] A. C.

132, 144, 150, where the H. L. applied and perhaps extended the doctrine in peculiar circumstances: see L. Q. R. xxx. 135. We may have gone beyond the text of the authorities in definitely stating the rule as founded on estoppel which we think the best explanation.

S. B. A. in interest, may institute a suit to have the instrument rectified; and if the Court find it clearly proved that there has been fraud or mistake in framing the instrument, and ascertain the real intention of the parties in executing the same, the Court may in its discretion rectify the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

S. 31.

Illustrations.

(a) A. intending to sell to B. his house and one of three godowns adjacent to it, executes a conveyance prepared by B. in which, through B.'s fraud, all three godowns are included. Of the two godowns which were fraudulently included, B. gives one to C. and lets the other to D. for a rent, neither C. nor D. having any knowledge of the fraud. The conveyance may, as against B. and C. be rectified so as to exclude from it the godown given to C. but it cannot be rectified so as to affect D.'s lease.

(b) By a marriage settlement, A., the father of B., the intended wife, covenants with C., the intended husband, to pay to C., his executors, administrators and assigns, during A.'s life, an annuity of Rs. 5,000. C. dies insolvent and the official assignee claims the annuity from A. The Court, on finding it clearly proved that the parties always intended that this annuity should be paid as a provision for B. and her children, may rectify the settlement and decree that the assignee has no right to any part of the annuity.

[The material question is what the partner intended to express in the settlement, not what they "always intended."]

Rectification.—To establish a right to rectification of a document it is necessary to show that there has been either fraud or common mistake (i). The mistake of one party to a contract is not a ground for rectification (j). Oral evidence is admissible to prove either fraud or mistake (k). Under the terms of the section it is necessary that the Court should find it clearly proved that there was fraud or common mistake. This requirement has, of course, been long established by English decisions (l). See notes "Rectification—introductory" on pp. 929-930 above.

(i) *Amanat Bibi v. Luchman Pershad Co.* (1892) 16 Bom. 561.
 (1887) 14 I. A., 18, 14 Cal. 308 (elementary law in England).
 (k) Evidence Act, 1872, s. 92, proviso (1).
 (j) *Haji Abdul Rahman v. The Bombay and Persia Steam Navigation Co.* (1906) 30 Bom. 457, 484.
 (l) *Madhavji v. Ramnath* (1906)

"Mutual" mistake.—The mistake referred to in this section is in the expression of a contract, not in its formation. "The Court in administering equitable principles permit *mistake* to be proved where it is common: that is, where the expression of the contract is contrary to the concurrent intention of all the parties. If such mistake be established, then the Court can give the relief of rectification, but be it noted, (as therein error often lurks) that what is rectified is not the agreement, but the mistaken expression of it. Ordinarily this mistaken expression would be in the form of a document, and the existence of a real agreement prior to the document is necessarily implied. The rectification consists in bringing the document into conformity with this prior agreement, and without such agreement there can be no rectification. It is an adjustment of the machinery to its proper end" (m). But if the common mistake is in the formation of a contract, both the parties being under a mistake as to a matter of fact essential to the contract, the case is not one for rectification (n), though it may be one for cancellation; the reason is that in such a case there is no contract at all. "Courts of equity do not rectify contracts. They may and do rectify instruments purporting to have been made in pursuance of the terms of contracts. But it is always necessary for a plaintiff to show that there was an actual concluded contract antecedent to the instrument which is sought to be rectified and that such contract is inaccurately represented in the instrument" (o). See pp. 929-930 above.

S. R. 1
S. 31

Counterclaim for rectification.—Though this and the subsequent sections of this chapter refer only to suits for rectification, a defendant may, it is conceived, counterclaim for rectification where the rules by which the Court is governed permit of such a counterclaim. Where the rules of a Court do not permit it, as in the case of Mufassal Courts, those Courts as Courts guided by the principles of justice, equity and good conscience can give effect as a plea to those facts which in a suit brought for that purpose would entitle a plaintiff to rectification. It has been so held by the

(m) *Dagdu v. Bhana* (1904) 28 *Bombay & Persia Steam Navigation Co.*
 Bom. 420, 425-426, per Jenkins, C.J. (1892) 16 Bom. 561, 565-566, per Farran,

(n) See *Contract Act*, S. 20. J. All this, again, has long been ele-

(o) *Haji Abdul Rehman v. The* mentary in English courts.

S. R. A. High Court of Bombay (p). The Calcutta High Court has held differently. According to the latter Court, a document, though it does not by fraud or mistake truly express the intention of the parties, is binding on the defendant until he gets it rectified by a suit brought for that purpose, and he cannot set up those facts as a defence to the suit (q). This view of the law, it is submitted, is not correct.

Rights acquired by third persons in good faith.—In ill. (a), the transfer to C. is not “for value,” and the conveyance may therefore be rectified as regards the godown transferred to him, though he had no knowledge of B.’s fraud. The transfer to D., however, is for value, and he having no knowledge of the fraud, the conveyance cannot be rectified so as to affect his lease. The following is an additional illustration:—

A. mortgages certain land to B. In the mortgage bond survey No. 49-D is inserted by mutual mistake for survey No. 49-A. Subsequently A. mortgages survey No. 49-A to C., who had knowledge of the mistake. E.’s mortgage bond may be rectified by substituting survey No. 49-A for survey No. 49-D. C., having knowledge of the mistake, cannot be said to have acquired his rights “in good faith” (r).

32. For the purpose of rectifying a contract in writing, the Court must be satisfied that all the parties thereto intended to make an equitable and conscientious agreement.

Presumption as to intent of parties.

See p. 931 above.

33. In rectifying a written instrument the Court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be.

Principles of rectification.

See p. 931 above.

(p) *Dagdu v. Bhana* (1904) 28 Bom. Cal. 118.

420, 426. (r) *Mahadeva v. Gopalal* (1911) 34

(q) *Anarullah v. Koylash* (1882) 8 Mad. 51.

Specific enforce-
ment of rectified
contract.

34. A contract in writing may be first rectified and then, if the plaintiff has so prayed in his plaint and the Court thinks fit, specifically enforced.

S. B. A
S. 34, C
IV.

Illustration.

A. contracts in writing to pay his attorney, B., a fixed sum in lieu of costs. The contract contains mistakes as to the name and rights of the client, which, if construed strictly, would exclude B. from all rights under it. B. is entitled, if the Court thinks fit, to have it rectified, and to an order for payment of the sum, as if at the time of its execution it had expressed the intention of the parties.

[Now settled practice in England: *Olley v. Fisher* (1886) 34 Ch. D. 367. The illustration is founded on the headnote to *Stedman v. Collett* (1854) 17 Beav. 608, 99 R. R. 310; but the language there used is erroneous; the Court treated the effect of the agreement as a matter of construction. The main point decided was the validity of the settlement with the solicitor for a fixed sum.]

CHAPTER IV.

OF THE RESCISSION OF CONTRACTS.

Judicial rescission : introductory.—Apart from faults of workmanship, it seems doubtful whether a great part of ss. 35-38 is not out of place here. The grounds on which contracts may be voidable have already been laid down in the Contract Act; and, by the very definition, rescission depends not on the Court but on the option of a party, which he can exercise without the aid of the Court. No one in England ever heard of a suit merely for rescission. Modern practice would allow of suing for a judicial declaration that a contract is rescinded; but in fact there is always some further object, such as recovering back a deposit or other payment under the contract, reconveyance of property which has been transferred or cancellation of the instrument in which the contract was expressed.

S. 35 has been influenced by art. 1903 of the New York draft Civil Code. S. 36 is identical with art. 1904. It seems not to have occurred to any one in the Indian Legislative Department to see that the language conformed to the Contract Act, which it does not.

S. R. A.
Ch. IV,
S. 35.

The text of s. 35 is plain enough on its face ; the principles governing the rescission of contracts have already been considered in various places of our commentary on the Contract Act, especially on ss. 39, 53, 64 and 65. Cl. (b) perpetuates a technical rule derived from the limited jurisdiction of English Courts of equity ; those Courts would not rescind or cancel an instrument which was already manifestly bad in a Court of Law (s). It is hard to see why the High Courts of India should be burdened with this positive disability rather than left to use their discretion.

S. 36, so far as intelligible, appears to be covered by ss. 20, 22, 64 and 65 of the Contract Act. It is difficult to reconcile the language either with sound principle or with the terms of I. C. A., s. 22. Mistake may prevent any real agreement from being formed ; we are not aware of any case in which, on the ground of "mere mistake", a contract is only voidable. In certain cases one party by whose fault the other has entered into a show of agreement under a vital mistake, is estopped, if that other elects to affirm the agreement, from denying its validity, and yet it is wholly void as against third persons : see the note at p. 88, above, on I. C. A., s. 13.

S. 37 agrees with English practice and needs no comment. S. 38 adds nothing to I. C. A., s. 65.

35. Any person interested in a contract [in writing]
When rescission
may be adjudged. (t) may sue to have it rescinded, and such
 rescission may be adjudged by the Court
 in any of the following cases, namely :—

- (a) where the contract is voidable or terminable by the plaintiff ;
- (b) where the contract is unlawful for causes not apparent on its face, and the defendant is more to blame than the plaintiff ;

(s) See *Brooking v. Maudslay, Son & Field* (1888) 38 Ch. D. 636 (the Judicature Act extended equitable jurisdiction to all branches of the Supreme Court, but did not enlarge its contents).
 (t) The words "in writing" are repealed wherever the Transfer of Property Act, 1882, is in force.

- (c) where a decree for specific performance of a contract of sale, or of a contract to take a lease, has been made, and the purchaser or lessee makes default in payment of the purchase money or other sums which the Court has ordered him to pay (*u*). S. R. A
S. 35.

When the purchaser or lessee is in possession of the subject-matter, and the Court finds that such possession is wrongful, the Court may also order him to pay to the vendor or lessor the rents and profits, if any, received by him as such possessor.

In the same case, the Court may, by order in the suit in which the decree has been made and not complied with, rescind the contract, either so far as regards the party in default, or altogether, as the justice of the case may require.

Illustrations—

to (a)—

A. sells a field to B. There is a right of way over the field of which A. has direct personal knowledge, but which he conceals from B. B. is entitled to have the contract rescinded.

to (b)—

A., an attorney, induces his client B., a Hindu widow, to transfer property to him for the purpose of defrauding B.'s creditors. Here the parties are not equally in fault, and B. is entitled to have the instrument of transfer rescinded.

[This is a matter of conveyance, but it presupposes or includes a contract.]

Rescission.—See notes, "Judicial rescission: introductory," pp. 935-936 above.

"Any person interested in a contract."—The remedy by way of rescission is not confined to persons named as parties to a contract; it is open to any person, who, though not named as a party to a contract, is interested in the contract. Thus any member of a

(u) The proper way of proceeding in the existing suit: *Clark v. Wallis* in England & by order made on motion (1866) 3 Beav. 460, 147 R. R. 260.

S. R. A. joint Hindu family is entitled to rescind a contract entered into by
 ss. 35-37. the manager, whereby the former would be defrauded (v).

Clause (a): Voidable contract.—This clause, it is conceived, comprises cases referred to in ss. 19, 19A, 39, 53 and 55 of the Indian Contract Act. It also, it is submitted, includes cases where a power to rescind is reserved by the contract to one or both of the contracting parties.

Clause (b): in *pari delicto*.—The provisions of this clause do not apply if the parties are *in pari delicto* (w). See notes to ss. 23 and 65 of the Indian Contract Act.

Lapses of time and limitation.—See notes under the same head to s. 16 of the Indian Contract Act, pp. 112-113 above.

36. Rescission of a contract in writing (x) cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

Rescission for mistake.

See notes on pp. 935-936 above.

37. A plaintiff instituting a suit for the specific performance of a contract in writing may pray in the alternative that, if the contract cannot be specifically enforced, it may be rescinded and delivered up to be cancelled; and the Court, if it refuses to enforce the contract specifically, may direct it to be rescinded and delivered up accordingly.

Alternative prayer for rescission in suit for specific performance.

This section is almost verbally identical with the opening of § 1058 in Fry on Specific Performance, p. 518.

(v) *Ravji v. Gangadharbhat* (1880) 4 Bom. 29. In this case the manager, while ostensibly selling the right to cut wood in a forest belonging to the family for Rs. 4,000, made a collateral private bargain according to which he

was to receive Rs. 4,000 more.

(w) *Hari v. Naro* (1894) 18 Bom. 342.

(x) The words "in writing" are repealed wherever the Transfer of Property Act, 1882, is in force.

38. On adjudging the rescission of a contract, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.
- S. R. A.
Ss. 38, 39
- Court may require party rescinding to do equity.

See I. C. A., ss. 11, 64, 65 above.

CHAPTER V.

OF THE CANCELLATION OF INSTRUMENTS.

39. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
- When cancellation may be ordered.

If the instrument has been registered under the Indian Registration Act (y), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.

Illustrations.

(a) A., the owner of a ship, by fraudulently representing her to be seaworthy, induces B., an underwriter, to insure her. B. may obtain the cancellation of the policy.

(b) A. conveys land to B., who bequeaths it to C. and dies. Thereupon D. gets possession of the land and produces a forged instrument stating that the conveyance was made to B. in trust for him. C. may obtain the cancellation of the forged instrument.

(c) A., representing that the tenants on his land were all at will, sells it to B., and conveys it to him by an instrument, dated the 1st January, 1877. Soon after that day, A. fraudulently grants to C. a lease of part of the lands, dated the 1st October, 1876, and procures the lease to be registered under the Indian Registration Act. B. may obtain the cancellation of this lease.

(y) See now Act XVI of 1908.

S. R. A.
S. 39.

(d) A. agrees to sell and deliver a ship to B., to be paid for by B.'s acceptances of four bills of exchange, for sums amounting to Rs. 30,000, to be drawn by A. on B. The bills are drawn and accepted, but the ship is not delivered according to the agreement. A. sues B. on one of the bills. B. may obtain the cancellation of all the bills.

[*Anglo-Danubian Co. v. Rogerson* (1867) L. R. 4 Eq. 3. The disputed point for which the case is reported was on a question of procedure which is now obsolete in England and could never arise in India.]

When cancellation may be ordered.—To entitle a plaintiff to a decree for cancellation of an instrument, three points must be made good by him, namely,—

- (1) that the instrument is void or voidable ;
- (2) that the plaintiff has reasonable apprehension that the instrument, if left outstanding, may cause him serious injury ; and
- (3) that the Court ought under the circumstances of the case, in the exercise of its discretion, to order it to be delivered up and cancelled. Delay in the institution of the suit or the plaintiff's conduct may be such that the Court may in the exercise of its discretion refuse to grant him relief. The appellate Court will not lightly interfere with an exercise by the first Court of its discretion. But if there is no exercise of discretion at all by the lower Court in decreeing cancellation of an instrument, the appellate Court may set aside the decree (a).

In the exercise of this discretion, the Court should ordinarily, where a plaintiff is out of possession and is in a position to claim a decree for possession, refuse to pass a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land, and leave the plaintiff to a suit for possession (b).

Any person against whom an instrument is void or voidable.—The relief by way of cancellation of an instrument may be claimed not only by a party to the instrument, but by any person against whom the instrument is void or voidable. Thus a creditor

(a) *Valley Mahomed v. Dattubhoy* (1901) 25 Bom. 10, 18-19, 24 [suit for cancellation of an award]. (b) *Shankar Lal v. Sarup Lal* (1912) 34 All. 140, 142

may sue on behalf of himself and all other creditors to set aside a deed executed by his debtor by which the creditors are defrauded, defeated or delayed within the meaning of s. 53 of the Transfer of Property Act (c). S. R. A.
S. 39.

Reasonable apprehension of serious injury.—It cannot be laid down as a rule of law that in no case a man, who has parted with his property, in respect of which a void or voidable instrument exists, can sue to have such instrument cancelled. The test is, “reasonable apprehension of serious injury”. Whether that exists or not, must depend on the circumstances of the particular case with which the Court has to deal. Thus where the swami of a math who had become old and blind executed a *jimnapatra* whereby he appointed the defendant manager of the properties of the math upon certain terms, and delivered possession of some of the math properties to the defendant, and the swami subsequently sold the math properties to another person, and thereafter brought a suit against the defendant for cancellation of the *jimnapatra* alleging that the defendant had failed to comply with the terms of the instrument, it was held by the High Court of Bombay that though the swami had sold the math properties and had no longer any interest in them, he was entitled to maintain the suit, the grounds of the decision being that if the document were not cancelled, the purchaser (who, it may be observed, was joined as a plaintiff) might sue the swami for a return of his purchase money if the swami could not give possession of the lands by reason of the defendant holding them under the *jimnapatra*, and that there was danger also of the defendant suing the swami in respect of the lands of which the defendant had not obtained possession (d). In an earlier Madras case, however, where the plaintiff, who had sold and delivered possession of her property to the buyer (her nephew), sued the defendant for cancellation of the sale-deed, alleging that the defendant had forged it in the name of the plaintiff as executant and that if the instrument was left outstanding she might be sued by the buyer on the covenants relating to the property, it was held that the plaintiff was not entitled to a decree for cancellation. The Court

(c) *Ishvar v. Dewar* (1903) 27 Bom. 148.

(d) *Kotrabassappaya v. Chenvirappaya* (1899) 23 Bom. 375.

S R. A. said : " Clearly she had no legal interest in the property comprised
B. 39. in the sale-deed, but it is suggested that she is entitled to have that instrument cancelled in case any action for damages should be brought against her on the covenant contained in the document executed in her nephew's favour. We are of opinion that this bare possibility does not entitle a plaintiff who has divested herself of all interest in the property to maintain this suit " (c). This view of the law, it is submitted, is not correct. We are inclined to think that apprehension of a party being used on covenants in a conveyance apparently binding is reasonable apprehension of serious injury within the meaning of this section, and, other conditions being present, he is entitled to a decree for cancellation (f). It is different, however, where the defendant has already sued and obtained a decree against the buyer on the alleged forged instrument, and the plaintiff subsequently sues the defendant not only for cancellation of the instrument, but to set aside the decree. The plaintiff, not being a party to the decree, is not entitled to have it set aside unless the buyer is joined as a party to the suit (g).

Where A. sues B. on a bond which B. alleges is void, *e.g.*, as being passed for a balance due on wagering transactions, and pending the suit B. sues A. for cancellation of the bond, B. is not entitled to cancellation. It cannot be said in such a case that B. would suffer serious injury if he did not bring the suit, for the very plea which is the foundation of B.'s suit is his defence in A.'s suit (h). Moreover, the question of the validity of the bond being before the Court in A.'s suit, it cannot be said thus far that it would be left " outstanding " within the meaning of this section. But where A. sues B. for possession of certain land under s. 9 of the Act, and pending the suit he sues B. for cancellation of a deed of gift under which B. claims title to the land, there is nothing to prevent the Court from decreeing A.'s second suit, for the question in the second suit is one of title, while there is no such question in the first suit, the only question in the first suit being whether A. was dispossessed otherwise than in due course of law (i).

(e) *Iyyappa v. Ramalakshamma* 439.
(1890) 13 Mad. 549. (h) *Chhaganlal v. Dhondu* (1903) 27
(f) See also (1899) 23 Bom. 375, at Bom. 607.
p. 380, *supra*. (i) *Jai Gopal v. Lalit Mohan* (1904)
(g) *Jhuna v. Beni Ram* (1887) 9 All. 26 All. 236. See notes to s. 9 above.

Registration.—The proceedings of a Registrar under the Registration Act are of an executive officer invested with *quasi-judicial* functions, and not proceedings of a judicial character. An order, therefore, made by the Registrar for the registration of a document of which the execution is denied by the party alleged to have executed it is no bar to a suit by such party for cancellation of the document under this section. That this is so is clear from the provisions of the second paragraph of this section (j). S. R. A. Ss. 39, 40

Limitation.—Where a document is voidable (as distinguished from void), so that possession of the property to which it relates could not be recovered until the document is set aside, and the suit is for cancellation of the document and for possession, the period of limitation is 3 years as provided by art. 91 of the Limitation Act; art. 144 which provides a period of 12 years does not apply to such a case (k). Art. 91 does not apply where the document is void from its very inception; the reason is that a document which is void *ab initio* does not require to be set aside (l). See also notes to s. 16 of the Contract Act under the head “Lapse of time and limitation”, pp. 112-113 above.

40. Where an instrument is evidence of different rights or different obligations, the Court may, in a proper case, cancel it in part and allow it to stand for the residue.

What instruments may be partially cancelled.

Illustration.

A. draws a bill on B., who endorses it to C., by whom it appears to be endorsed to D., who endorses it to E. C's endorsement is forged. C. is entitled to have such endorsement cancelled, leaving the bill to stand in other respects.

Partial cancellation.—This section should not be applied unless the rights or obligations evidenced by an instrument are

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| (j) <i>Mohima Chunder v. Jugul Kishore</i> (1881) 7 Cal. 736. | (l) <i>Unni v. Kunchi Amma</i> (1891) 14 Mad. 26; <i>Jagadeo v. Phulhari</i> (1908) 30 All. 375; <i>Banku Behari v. Krist Gobindo</i> (1903) 30 Cal. 433. See also <i>Raikishori v. Debendranath</i> (1888) 1 I. A. 38, 49-50, 15 Cal. 409, 421. |
| (k) <i>Rani Janki Kunwar v. Raja Ajit Singh</i> (1887) 14 I. A. 148, 15 Cal. 58; <i>Bakratram v. Kharsetji</i> (1903) 27 Bom. 560; <i>Govindasami v. Ramasamy</i> (1909) 32 Mad. 72. | |

S. R. A. distinct and separable. The following are further illustrations:—
ss. 40, 41.

(1) In 1871 A. agrees to grow indigo for B. on $20\frac{1}{2}$ bighas of land for a period of 9 years at the rate of Rs. 2 per bigha per annum. Of these $16\frac{1}{2}$ bighas are situated in village R., and are held by A. under a sub-lease from X., Y. being the superior landlord, and the remaining 4 bighas are situated in village K. and belong to A. K. fails to pay the rent to Y., and in 1874 Y. resumes possession of the land. The contract becoming impossible of performance (see Contract Act, s. 56), A. may obtain cancellation of the agreement as regards the $16\frac{1}{2}$ bighas situated in village R. : *Inder Pershad v. Campbell (m)*.

(2) A. executes a deed of mortgage in favour of B. A. gets back the deed from B. by fraud, and endorses on it a receipt for Rs. 1,200 purporting to be signed by B. B.'s signature is forged. B. is entitled to have the endorsement cancelled, leaving the deed to stand in other respects : *Ram Chandar v. Ganga Saran (n)*.

41. On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.

Power to require party for whom instrument is cancelled to make compensation.

Compensation.—Compensation includes, of course, return of any payment received as part of the transaction annulled or avoided (o).

Compensation on cancellation.—Where a deed of hypothecation or a deed of sale is ordered to be set aside on the ground of collusion between the grantor's manager and the lender, it being proved that the grantor was of weak intellect and that in some cases the money was paid to the grantor and sometimes to his manager, the condition of cancelling the deeds should be, not the repayment of moneys proved to have been received by the manager, but of sums shown to have been actually paid to the grantor personally, or borrowed by the manager in the course of prudent management of the estate (p). Where a person advances a small sum

(m) (1881) 7 Cal. 474.

(1871) 14 Moo. I. A. 53, 65.

(n) (1917) 39 All. 103.

(p) *Ajit Singh v. Bijai Bahadur*

(o) See *Guthrie v. Abool Moruffur Singh* (1884) 11 I. A. 211, 11 Cal. 61.

of money to another, and obtains from the latter by fraud in repayment of the loan a deed of sale of property worth considerably more than the amount of the loan, all that he is entitled to on cancellation of the deed is to be placed in the same position in which he would have been, had he obtained a deed of mortgage instead of a deed of sale. He is not entitled to any allowance for repairs and improvements made by him to the property, the deed of sale having been obtained by fraud (g).

S. R. A.
Ss. 41, 42.

Minors.—See notes to s. 11 of the Contract Act under the head “Fraudulent representation,” p. 69 above.

CHAPTER VI (r).

OF DECLARATORY DECREES.

42. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief (s).

Discretion of Court as to declaration of status or right.

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Bar to such declaration.

EXPLANATION.—A trustee of property is a “person interested to deny” a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

(g) *Sadashiv v. Dhakubai* (1881) 5 Bom. 450. in England was confined to cases where the plaintiff had a present cause of

(r) As to the Punjab, see also the Punjab Land-revenue Act, 1887 (XVII of 1887), s. 45. action. It was extended in 1883; see *Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 K. B. 536, at pp. 557-562, per Pickford L.J.

(s) When the Act was passed the power of making declaratory decrees

S. R. A.
S. 42.

Illustrations.

(a) A is lawfully in possession of certain land. The inhabitants of a neighbouring village claim a right of way across the land. A. may sue for a declaration that they are not entitled to the right so claimed.

(h) A. bequeaths his property to B., C. and D., "to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children." No such children are in existence. In a suit against A.'s executor, the Court may declare whether B., C. and D. took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.

(c) A. covenants that, if he should at any time be entitled to property exceeding one lakh of rupees, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The Court may make the declaration.

[Under the old English practice such a suit was dismissed as premature: *Fyfe v. Arbutnot* (1857) 1 De G. & J. 406, 98 R. R. 151.]

(d) A. alienates to B. property in which A. has merely a life interest. The alienation is invalid as against C., who is entitled as reversioner. The Court may in a suit by C. against A. and B. declare that C. is so entitled.

(e) The widow of a sonless Hindu alienates part of the property of which she is in possession as such. The person presumptively entitled to possess the property if he survive her may, in a suit against the alienor, obtain a declaration that the alienation was made without legal necessity and was therefore void beyond the widow's lifetime.

(f) A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid.

(g) A. is in possession of certain property. B., alleging that he is the owner of the property, requires A. to deliver it to him. A. may obtain a declaration of his right to hold the property.

(h) A. bequeaths property to B. for his life, with remainder to B.'s wife and her children, if any, by B., but, if B. die without any wife or children, to C. B. has a putative wife, D., and children, but C. denies that B. and D. were ever lawfully married, D. and her children may, in B.'s lifetime, institute a suit against C. and obtain therein a declaration that they are truly the wife and children of B.

Origin and purpose of the section.—The history of decrees merely declaratory is as follows :—

(1) Before the Chancery Procedure Act of 1852 it was not the practice of the Courts in England to make a

declaration of right except as introductory to relief which it proceeded to administer (*t*). S. R. A. S. 42.

- (2) Decrees merely declaratory are an innovation, and they first obtained authoritative sanction in England by s. 50 of the Chancery Procedure Act of 1852 (15 & 16 Vict., c. 86) (*u*).

- (3) Seven years later, India followed suit with s. 15 of the Code of Civil Procedure, 1859, by which it was enacted as follows :—

“ No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for civil courts to make binding declarations of right without granting consequential relief ” (*v*).

- (4) S. 15 of the Procedure Code of 1859 was in the same terms as s. 50 of the Chancery Procedure Act. As to the latter section, it was held by the Courts in England that it gave a right of obtaining a declaration of title only in those cases where the Court could have granted relief if relief had been prayed for (*w*). The same interpretation was put by the Judicial Committee of the Privy Council on s. 15 of the Procedure Code. In *Kathama Natchiar v. Dorasinga* (*x*), their Lordships of the Privy Council after observing that the application of s. 15 of the Procedure Code must be governed by the same principles as those upon which the Court of Chancery proceeds in reference to the Chancery Procedure Act, s. 50, said as to s. 15 of the Code : “ It appears, therefore, to their Lordships, that the construction which must be put upon the clause in question is, that a declaratory decree cannot be made unless there be a right to

(*t*) *Fischer v. The Secretary of State for India* (1899) 26 I. A. 16, 28, 22 Mad. 270, 282.
 (*u*) *Dokali Koer v. Kedar Nath* (1912) 39 Cal. 704, 708.
 (*v*) The decisions on this enactment are reviewed in *Kathama Natchiar v. Dorasinga* (1875) 2 I. A. 169, 187-190.
 (*w*) *Rooke v. Lord Kensington* (1850) 2 K. & J. 753; *Lady Langdale v. Briggs* (1856) 8 De G. M. & G. 391.
 (*x*) (1875) 2 I. A. 169, 187; *Nilmony Singh v. Kally Churn* (1875) 2 I. A. 83, 14 Beng. L. R. 382.

S. R. A. consequential relief capable of being had in the same
S. 42. Court or in certain cases some other Court" (y).

(5) The Code of 1859 was repealed by the Code of 1877, and the provision as to declaratory decrees transferred to s. 42 of the Specific Relief Act which was passed in the same year.

(6) "The terms of the section [s. 42] are not a precise reproduction of the provision contained in the Act of 1859 and the English law : in one direction they are more comprehensive, in another more limited. It is common tradition that the section was designed to be a substantial reproduction of the Scotch action of *declarator*, but whether this is so or not is of no great moment. We have to be guided by its provisions as they are expressed" (z).

(7) Before the Specific Relief Act the Courts in India had no power to make a merely declaratory decree independently of s. 15 of the Code of Civil Procedure, 1859 : the power to make such decrees rested entirely upon that section (a). It might have been thought that since the enactment of s. 42 of the Specific Relief Act the power of the Courts in India to make a decree merely declaratory rested entirely upon s. 42, and that the Courts had no power to make such a decree independently of that section, but a different view has been taken in some cases which are considered below under the head "Whether a decree merely declaratory can be made independently of this section," p. 949 below.

Scope of the Section.—In a suit under this section—

- (1) the plaintiff must be a person entitled to any legal character or to any right as to any property ;
- (2) the defendant must be a person denying, or interested to deny, the plaintiff's title to such character or right ;

(y) *E.g.*, a Revenue Court: *Sadut Ali Khan v. Abdool Gunney* (1873) 39 Cal. 704, 709.
L. R. 1. A. (Suppl.) 165, 171, 11 Beng. (a) (1875) 2 I. A. 169, 179-180, *supra*.
L. R. 203, 226-227.

- (3) the declaration sued for must be a declaration that the plaintiff is entitled to a legal character or to a right to property; and
- (4) where the plaintiff is able to seek further relief than a mere declaration of title, he must seek such relief.

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If any of the first three conditions is not fulfilled, the suit should be dismissed. If those conditions are fulfilled, but the fourth is not, the Court shall not make the declaration sued for.

In *Deokali Koer v. Kedar Nath (b)*, Sir Lawrence Jenkins said: "The section does not sanction every form of declaration, but only a declaration that the plaintiff is 'entitled to any legal character or to any right as to any property'; it is the disregard of this that accounts for the multiform and, at times, eccentric declarations which find a place in Indian plaints. If the Courts were astute—as I think they should be—to see that the plaint presented conformed to the terms of section 42, the difficulties that are to be found in this class of cases would no longer arise." In the same case the learned Judge said: "It is a common fashion to attempt an evasion of Court-fees by casting the prayers of the plaint into a declaratory shape. Where the evasion is successful it cannot be touched, but the device does not merit encouragement or favour" (c).

Whether a decree merely declaratory can be made independently of this section,—In *Kathana Natchiar v. Dorasigna (d)*, which was a case under s. 15 of the Code of Civil Procedure, 1859, it was argued that the Courts in India had the power to make a merely declaratory decree independently of that section, but this contention was not upheld, and their Lordships held that the power of the Courts in India to make a merely declaratory decree rested upon that section. In delivering the judgment of their Lordships of the Privy Council Sir James Colville said: "They (their Lordships) at first conceived that the power of the Courts in India to make a merely declaratory decree was admitted to rest upon the 15th section of the Code of Civil Procedure, the effect of which has been so much discussed. Mr. Doyne, however, raised some question as to that, and suggested that the power was

(b) (1912) 39 Cal. 704, 709. *

(d) (1875) 2 I. A. 169, 179-180.

(c) *Ib.*, pp. 707-708.

S. R. A. possessed by the Courts in the mofussil before the Code of Procedure
 S. 42. was passed, and had not been taken away thereby. No authority which establishes the first of these propositions was cited; and their Lordships conceive that if the Legislature had intended to continue to those Courts the general power of making declarations (if they ever possessed such a power), it would not have introduced this clause into the Code of Civil Procedure, which, if a limited construction is to be put upon it, clearly implies that any decree made in excess of the power thereby conferred would be objectionable, the words of the section being : 'No suit shall be open to objection on the ground that a merely declaratory decree or order is sought thereby, and it shall be lawful for the Civil Courts to make binding declarations of right without granting consequential relief'. Nor does any Court in India since the passing of the Code seem to have considered that it had the power of making declaratory decrees independently of that clause." The same reasoning applies with equal force to cases arising after the passing of the Specific Relief Act; that is to say, the power of Courts to make a decree merely declaratory since the passing of the Specific Relief Act rests entirely upon s. 42 of the Act, and that the Courts have no power to make such a decree independently of that section. A different view, however, has been taken by the High Court of Madras. According to that Court a suit for a declaration of right may not be within the purview of s. 42, and yet it may be maintainable. It has thus been held that a pleader who was debarred from practising in village Courts by an order of the Collector purporting to have been made under the Madras Village Courts Act on the ground of misconduct may sue for a declaration that the order is void. The suit was against the Secretary of State for India in Council, and the Court held that the Collector had no power to make any such order under the said Act, and it made the declaration (e). Reliance was placed by the High Court upon *Fischer v. Secretary of State for India* (f), in which Lord Macnaghten in delivering the judgment of their Lordships of the Privy Council said : "Now, in the first place it is at least open to doubt whether the present suit is within the purview of s. 42 of the Specific Relief

(e) *Ramachandra v. The Secretary of State for India* (1916) 39 Mad. 808. (f) (1899) 26 I. A. 16, 27-28, 22 Mad. See also *Ramakrishna v. Narayana* (1916) 270, 282.

Act. There can be no doubt as to the origin and purpose of that section. It was intended to introduce the provisions of s. 50 of the Chancery Procedure Act of 1852 (15 and 16 Vict., c. 86) as interpreted by judicial decisions. Before the Act of 1852 it was not the practice of the Court in ordinary suits to make a declaration of right except as introductory to relief which it proceeded to administer. But the present suit is one to which no objection could have been taken before the Act of 1852. It is in substance a suit to have the true construction of a statute declared, and to have an act done in contravention of the statute rightly understood pronounced void and of no effect. This is not the sort of declaratory decree which the framers of the Act had in their mind. But even assuming that the Specific Relief Act applies to such a suit as this, what is the result? If the so-called cancellation is pronounced void the order of Government falls to the ground, and the decision of the Collector stands good and operative as from the date on which it was made. . . . Their Lordships are of opinion that the Government have been wrong throughout, and that the suit is properly framed and not open to objection under the Specific Relief Act." There was no point raised in the above case that s. 42 did not apply; on the other hand, it was assumed by counsel that s. 42 applied, but that there was no "further relief" claimed as required by s. 42.

On the other hand, in *Sheopursan Singh v. Ramnandan Singh* (g) Sir Lawrence Jenkins, in delivering the judgment of the Judicial Committee, said: "The Court's power to make a declaration without more is derived from s. 42 of the Specific Relief Act, and regard must therefore be had to its precise terms" (h). And in a recent case the High Court of Bombay said: "It has long been established that the general power vested in the Courts in India under the Civil Procedure Code to entertain all suits of a civil nature excepting suits of which the cognizance is barred by any enactment for the time being in force, does not carry with it the general power of making declarations except in so far as such power is expressly conferred by statute" (i).

(g) (1916) 43 I. A. 91, 97, 43 Cal. 694.

(i) *Vaktuba v. Agareingji* (1910)

(h) See also *Deokali Koer v. Kedar* 34 Bom. 676, 680.

Nath (1912) 39 Cal. 704, 708.

S. E. A. The above cases arose in the Mufassal. Whatever doubt there
 S. 42. may be as to the power of the High Court (j) to make a merely declaratory decree independently of s. 42, the Courts in the Mufassal had no such power at any time. The correct view, it is submitted, is that s. 42 is exhaustive of the cases in which a decree merely declaratory can be made, and that the Courts have no power to make such a decree independently of that section.

Discretion of the Court.—“It is not a matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not under all the circumstances of the case to grant the relief prayed for. There is so much more danger in India than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation” (k). It has accordingly been held that a decree should not be passed —

- (1) in a suit by a Hindu widow against her mother-in-law and a son adopted by the latter, for a declaration that the adoption is invalid and that a will made by the mother-in-law bequeathing the whole of her husband's property to the adopted son is invalid for the purpose of transferring the estate (l);
- (2) in a suit by a reversionary heir against a Hindu widow and a devisee under her will, for a declaration that the will is invalid for the purpose of transferring the estate (m);

(j) The Code of 1859 was originally intended for application in the Courts not established by Royal Charter, and it was not till the year 1862 (when Supreme Courts were abolished and High Courts established) that it was extended to the Courts in the Presidency Towns: see cl. 37 of the Letters Patent.

(k) *Narain Mitter v. Kishen Soon-dary Dassee* (1873) L. R. I. A. (Suppl.) 149, 162, 11 Beng. L. R. 171, 190; *Kaithama Natchiar v. Dorasinga* (1875)

2 I. A. 169, 181-182; *Sheoparsan Singh v. Ramnandan Singh* (1916) 43 I. A. 91, 97, 43 Cal. 694, 704-705; *Joseph v. Calcutta Corporation* (1916) 43 I. A. 243, 248, 44 Cal. 87.

(l) *Rani Pirthi Pal Kunwar v. Rani Guman Kunwar* (1890) 17 I. A. 107, 17 Cal. 933.

(m) *Thukurain Jaipal Kunwar v. Bhaiya Indar Bahadur Singh* (1904) 31 I. A. 67, 26 All. 238; *Vijiasami v. Sasivarma* (1905) 28 Mad. 560, 562.

- (3) for a declaration that the election of the defendant as a member of the Bengal Legislative Council is invalid (n);
- (4) in a suit by a purchaser of a reversionary interest against the trustees of a deed of settlement and the beneficiaries, for a declaration of his rights under the deed, when the circumstances are such that to give a declaratory decree would be to offer direct encouragement to speculative purchasers of doubtful titles (o).
- (5) where the case is of such a character that the decree, if passed, might be immediately rendered nugatory by an action of the defendant within the scope of his authority (p).

The Privy Council is reluctant to overrule the discretion of the lower Courts in granting a declaratory decree under this section (q).

A suit does not lie merely to set aside an assertion.—Thus a plaintiff, who is actually in receipt of rents from the defendants, his tenants, cannot sue to set aside a mere allegation of the defendants that they were holding the land under a certain tenure (r). But it is otherwise where the tenants set up not only a certain tenure, but exercise rights in the land inconsistent with the tenure under which the plaintiff alleges they hold the land, though consistent with the tenure set up by them (s). Note that in ill. (g) there is no mere allegation of ownership, but a demand for possession.

“Person entitled to any legal character or to any right as to any property”.—No suit is maintainable under this section unless the plaintiff is a person entitled to some legal character or to some right as to property, and the declaration sought is that he is entitled to such character or to such right (t). The right of the owner of a building to receive compensation from a public body for

(n) *Bhupendra Nath v. Ranjit Singh* (1914) 41 Cal. 384.

(o) *Bhujendro Bhusan v. Trigunanath* (1881) 8 Cal. 761.

(p) *Maharaj Narain v. Shashi* (1915) 37 All. 313.

(q) (1904) 31 I. A. 67, 26 All. 238, *supra*.

(r) *Nilmony Singh v. Kally Churn* (1875) 2 I. A. 83, 14 Beng. L. R. 382.

(s) *Kali Kishen v. Golam Ali* (1888) 13 Cal. 3, 11.

(t) *Sheoparsan Singh v. Ramanandan Singh* (1916) 43 I. A. 91, 97, 43 Cal. 604; *Deokali Koer v. Kedar Nath* (1912) 30 Cal. 704.

S. R. A. the removal of fixtures attached to the building is a right to property, and he may sue for a declaration of such right (u). A person entitled to property on the death of a Hindu widow may sue, where the parties are referred by a Revenue Court to a Civil Court, for a declaration that the widow is in possession of the property not as heir of a separated Hindu, but as the widow of a deceased coparcener in lieu of maintenance (v). A landlord who is in possession through his tenants may sue the defendant who claims the land as against him by an adverse title and has turned out the tenants for a declaration of his title as against the defendant and for possession which would be by receipt of rents from the tenants. It is a mistake to suppose that the tenants are the only persons entitled to sue in such a case (w). A person holding a *zur-i-peshgi* lease from an occupancy tenant and who has let out the land to others may sue the lessor and the sub-lessees for a declaration of his title as *zur-i-peshgi* lessee and for possession which could only be by receipt of rents from the sub-lessees (x). An owner of land has a right to bring a suit against any member of the public who formally claims to use such land as a public road (y). The right of a *gor* (priest) to conduct his *yajmans* (patrons) to a temple, to perform worship there on their behalf and receive presents from their patrons is a right to property, and the *gor* may sue for a declaration of such rights where those rights are interfered with (z). A plaintiff may under this section sue for a declaration that the defendant is not his son (a), or that the defendant is not his adopted son (b). A plaintiff in possession of property claiming to be the owner thereof may sue for a declaration that a decree obtained by one of the two defendants against the other affecting the plaintiff's property was collusive and is not binding on the plaintiff (c). A

(u) *Joseph v. Calcutta Corporation* (1916) 43 I. A. 243, 44 Cal. 87.

(v) *Ram Manorath Singh v. Dilraji* (1914) 36 All. 125.

(w) *Bissessuri v. Baroda Kanta Roy* (1884) 10 Cal. 1076.

(x) *Sita Ram v. Ram Lal* (1896) 18 All. 440 [F. B.]; *Ghulam Husain v. Mahammad Husain* (1909) 31 All. 271.

(y) *Ohuni Lal v. Ram Kishan Sahu* (1888) 15 Cal. 460 [F. B.].

(z) *Kalidas v. Parjaram* (1891) 15 Bom. 309.

(a) *Vaktuba v. Agarsingji* (1910) 34 Bom. 676.

(b) *Chinnasami v. Ambalavanna* (1906) 29 Mad. 48.

(c) *Gandla v. Sivanappa* (1915) 38 Mad. 1162. But see *Ganga v. Tapeshri* (1904) 26 All. 606, 607, and *Kunhamed v. Kuti* (1891) 14 Mad. 167.

suit may be brought under this section by the Mahomedan inhabitants of a village for a declaration that an *udgh* and the land adjoining it situated in the village is wakf property (*d*).

A suit does not lie under this section for a declaration that a valid personal contract still subsists between the plaintiff and the defendant. Such a suit is not for a declaration that the plaintiff is entitled to a legal character or to any right as to any property (*e*).

The right to use a street as a thoroughfare is a right which a Court might properly declare; but the right to pass along a street playing music is not a right which the courts ought to recognize in that sense (*f*).

A., a Hindu, dies leaving a widow B. R., A.'s executor, applies for probate of A.'s will. S. files a caveat, but the caveat is dismissed, and an order is made for a grant of probate to R. Subsequently S. sues R. and the widow for a declaration that he is the next reversioner to the estate of A. and, as such, is entitled to apply to the Court having probate jurisdiction for revocation of the grant of probate. S. is not entitled to sue under this section; as he is not entitled to any legal character or to any right to property. The reason is that even as a reversioner he cannot have any right to A.'s estate *unless A. died intestate*, and the grant of probate (*until revoked*) is conclusive that A. did not die intestate (*g*).

Declaration as to right to possession.—Ills. (a) and (g) show that a person in possession may sue for a declaration in certain events.

Where a person is in possession of land, and the defendant alleging that the land is wakf property and that he is the mutavali thereof interferes with his tenants and prevents them from paying rents to him, and it is found that the defendant is not the mutavali nor possessed of any interest in the land, such person is entitled to a declaration as against the defendant that he is *lawfully entitled to possession* and to an injunction restraining him from interfering

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- (*d*) *Muhammad Alam v. Akbar* 39 Mad. 80.
Husain (1910) 32 All. 631. But see (*f*) *Venkatesh v. Abdul Kadir* (1918)
Wajid Ali Shah v. Dianat-ul-Lah Beg 42 Bom. 438.
 (1886) 8 All. 31. (*g*) *Sheoparsan Singh v. Ramanandan*
 (*e*) *Ramkrishna v. Narayana* (1916) *Singh* (1916) 43 I. A. 91, 43 Cal. 694.

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with his possession. It is not necessary for him to be entitled to such a declaration to negative that the land was wakf property. It was so held by their Lordships of the Privy Council in *Ismail Ariff v. Mahomed Ghouse* (h), where their Lordships said: "The possession of the plaintiff [which was for a period of 6 years] was sufficient evidence of title as owner as against the defendant. By sec. 9 of the Specific Relief Act (Act I of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrong doer, to obtain a declaration of title as owner, and an injunction to restrain the wrong doer from interfering with his possession."

"Interested to deny."—A suit may be brought under this section not only against a person denying, but a person interested to deny, the plaintiff's right to property.

Where an order is made by a Magistrate under the provisions of the Criminal Procedure Code against a person directing him to remove an *otta* standing in front of his shop as an obstruction to the public way, such person may institute a suit against the Secretary of State for India in Council for a declaration that the land on which the *otta* stood is his property and that it does not form part of the public road. Public roads are under the Land Revenue Act (Bombay Act V of 1879) vested in the Government of Bombay, and the Government therefore are "interested to deny" the plaintiff's title to the land (i).

"Further relief."—A suit should not be dismissed if a plaintiff, being able to seek further relief, omits to do so. All that is provided by this section is that the Court shall not make a declaration in the events specified in the proviso, not that the Court shall

(h) (1893) 20 I. A. 90, 20 Cal. 834; *Gangaram v. The Secretary of State for India* (1896) 20 Bom. 798; *Hanmantrav v. The Secretary of State for India* (1901) 25 Bom. 287; *Ayyaparaju v. The Secretary of State for India* (1914) 37 Mad. 298, 300.
(i) *The Secretary of State for India in Council v. Jethabhai* (1893) 17 Bom. 293.

not grant the relief that is prayed (j). Where the plaintiff omits to seek further relief, and applies for an amendment in the Court of first instance, the Court should allow the amendment (k). Where the objection that the plaintiff has omitted to seek further relief is taken for the first time in appeal, the Court should not refuse to make the declaration, but allow the plaintiff an opportunity of amending the plaint (l). But no such amendment should be allowed where the objection is taken in the Court of first instance and the plaintiff notwithstanding persists in continuing the suit as framed (m).

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Injunction is "further relief" within the meaning of the proviso (n). And so is cancellation (o). A suit therefore for a declaration and an injunction or for a declaration and cancellation is a suit in which further relief is sought. But where in addition to an injunction the plaintiff might have prayed for possession, but omits to do so, the Court should not make the declaration. Thus a plaintiff suing for a declaration that he is the Sheik of Kalli and entitled as such to all the properties attached thereto and for an injunction against the defendant to restrain him from dealing with the properties, ought to pray for possession of the properties if they are in the defendant's possession at the date of suit. The reason is "that the further relief which the plaintiff is bound to claim is such relief as he would be in a position to claim from the defendant in an ordinary suit by virtue of the title which he seeks to establish and of which he prays for a declaration" (p). But a plaintiff suing for a declaration, that a conveyance of property by defendant A. to defendant B. taken by B. with notice of a prior agreement for sale of the property by A. to the plaintiff is not binding on the plaintiff and for specific

(j) *Sakharam v. The Secretary of State for India* (1904) 28 Bom. 332; *Kunj Bihari Prasadji v. Keshavlal* (1904) 28 Bom. 567.

(k) *Kalabhai v. The Secretary of State for India* (1905) 29 Bom. 19, 29.

(l) *Limba v. Rama* (1889) 13 Bom. 548; *Chomu v. Umma* (1891) 14 Mad. 46.

(m) *Suryanarayana murti v. Jammanna* (1902) 25 Mad. 504, 506; *Narayana v. Shankunni* (1892) 15 Mad. 255, 257-258; *Raj Narain Das v. Shama Nando Das*

(1899) 26 Cal. 845; *Shiv Ram v. Bhag Devi* (1918) Punj. Rec. No. 118, p. 374.

(n) *Kunj Bihari Prasadji v. Keshavlal* (1904) 28 Bom. 567; *Deokali Koer v. Kedar Nath* (1912) 39 Cal. 704. See s. 52 of the Act.

(o) *Tacoordeen v. Nawab Syed Ali* (1874) 1 I. A. 192, 13 Beng. L. R. 427. See s. 39 of the Act.

(p) *Abdulkadar v. Mahomed* (1892) 15 Mad. 15.

- S. R. A.** performance of the agreement, is not obliged to pray for delivering
S. 42. up and cancellation of the conveyance ; in such a case the suit is primarily one for specific performance, that is, for execution of a deed of sale of the property by A. to the plaintiff (g).

Under this section a plaintiff who is able to seek further relief than a mere declaration of title, is obliged to seek such relief ; if he omits to do so, the Court shall not make the declaration asked for. Thus a plaintiff out of possession suing for a declaration of title to land ought to pray for possession, if the defendant is in possession (r). But he is not obliged to do so, if the defendant is not in possession. "In order that a suit can be held to be unmaintainable by the application of section 42 of the Specific Relief Act, it must be shown that the defendant was in possession and as against him the plaintiff could have obtained an order for delivering up of possession" (s). Nor is he obliged to pray for possession if the property is in the hands of an officer of the Court (t), or if it is in the possession of the Court of Wards pending the adjudication of rival claims to the property (u). The fact that the property is in the possession of a third party who is interested in supporting the defendant's title does not oblige the plaintiff to pray for possession in addition to a declaration. "The restrictions imposed under s. 42 of the Specific Relief Act must be held to refer to the consequential relief properly obtained by the plaintiff as against the defendant in the suit, and are not to be extended to the case of all third parties who may possibly support some of the contentions of the defendant" (v).

A plaintiff suing for a declaration that property bequeathed by his father to the defendant (his brother) was ancestral, and that

(g) *Kannan v. Krishnan* (1890) 13 All. 312 [where the land was waste land].
 Mad. 324.

(r) *Bikutti v. Kalandan* (1891) 14 Mad. 267; *Narayana v. Shankuni* (1892) 15 Mad. 255; *Muttakke v. Thimmappa* (1892) 15 Mad. 186; *Kunhiamma v. Kunhunni* (1893) 16 Mad. 140; *Krishna-bhupati v. Ramamurti* (1895) 18 Mad. 406; *Rathnasabapati v. Ramasami* (1910) 33 Mad. 452; *Raj Narain Das v. Shams Nando Das* (1899) 26 Cal. 845;

(s) *Malaiyya v. Perumal* (1913) 36 Mad. 62.
 (t) *Vedanayaga v. Vedammal* (1904) 27 Mad. 591. See also *Brij Bhikhan v. Durga Dai* (1898) 20 All. 258.

(u) *Jagannath Gir v. Tirguna Nand* (1915) 37 All. 185. See also *Fakir Chand v. Akunda* (1887) 14 Cal. 586, 591-592.

(v) *Subramanyan v. Paramaswaran* (1888) 11 Mad. 116, 122.

his father had no power to bequeath it and that he was entitled to it by survivorship along with the defendant, ought to pray for partition of the property even if it be in the possession of tenants (w). Similarly, a plaintiff suing for a declaration of his right to succeed on his father's death to a *talukdari* estate to the exclusion of the defendant who claimed to be a legitimate son of his father, and to whom during his minority the Talukdari Settlement Officer was making an allowance for his maintenance under Bombay Act XXI of 1881, ought to pray for an injunction restraining the defendant from receiving the allowance (x). Where the plaintiffs, alleging that the defendant was in possession of a mutt and of the mutt properties under a false claim of title as successor of the late Jheer, sued for a declaration that he was not the duly appointed successor of the late Jheer and for the appointment of some duly qualified person as Jheer, it was held that no such declaration could be made as the plaintiff had omitted to ask for consequential relief, namely, that the mutt properties be handed over to the person so appointed (y).

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The three cases cited above mark the extreme limits of the application of the proviso to this section. The trustees of a temple, suing for a declaration that certain proceedings of a District Temple Committee removing them from that Office are illegal, are not obliged to pray that they should be reinstated in their office unless there has been an actual ouster of the plaintiffs from the office of trustees (z). In an Allahabad case, the plaintiff, alleging that he was the owner and in possession of a house, and that defendant A. had without any title mortgaged the house to defendant B., and that B. having obtained a decree on the mortgage against A. had caused the house to be proclaimed for sale, sued A. and B. for a declaration that the house was not liable to be sold in execution of the decree. It was held that the plaintiff was entitled to a declaration, and that the omission of a prayer to set aside the mortgage and the decree was no bar to the declaration. The Court said "There was no obligation on the plaintiff, even under the proviso to section 42, to have sued to set aside the mortgage or the decree, and, indeed, it is doubtful in our

(w) *Suryanarayanamurti v. Tammanne* (1902) 25 Mad. 505.

(y) *Strinivasa v. Strinivasa* (1893) 16 Mad. 31.

(x) *Sardarsinghji v. Ganpatsinghji* (1890) 14 Bom. 395 (Candy, J., doubting).

(z) *Ramanuja v. Devanayaka* (1885) 8 Mad. 361.

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S. 42. opinion if he had asked for such relief that he could have succeeded " (a).

It has been held by the High Court of Madras that a plaintiff suing for a declaration of title to land ought to pray for payment of arrears of rent. The Court said: "The object of the proviso to section 42 is to avoid multiplicity of suits and to prevent a person getting a declaration of right in one suit and, immediately after, the remedy already available in another" (b). On the other hand, it has been held by the High Court of Calcutta that "further relief" within the meaning of this section does not include a claim for arrears of rent and that omission to sue for arrears of rent is no bar to the Court making the declaration asked for. The Court said: "The further relief referred to in the proviso is, we think, further relief in relation to the legal character or right as to any property which any person is entitled to, and whose title to such character or right any person denies or is interested in denying" (c). A plaintiff suing the defendants for a declaration that they are his tenants is not obliged to pray for possession (d). In a suit under s. 92 of the Civil Procedure Code (public charities), no consequential relief can be claimed beyond what is allowed by the provisions of that section (e). See Mulla's Code, notes to s. 92.

The proviso to this section refers to the position of the plaintiff at the date of suit (f). Hence where a suit for a declaration, when instituted, is in every respect regular, no action on the part of the defendant subsequent to the institution of the suit can affect or prejudice the right of the plaintiff (g). Similarly any change of circumstances brought about by the plaintiff himself purchasing the property in respect of which the suit is brought does not take away the right to sue which had accrued to him prior to the date of the suit (h).

(a) *Ganga Ghulam v. Tapeshri Prasad* (1904) 26 All. 606.

(1903) 26 Mad. 450.

(b) *Kombi v. Aundi* (1890) 13 Mad. 75.

(f) *Govinda v. Perumderi* (1899) 12 Mad. 133.

(c) *Fakirchand v. Anund Chunder* (1887) 14 Cal. 586-591.

(g) *Ram Adhar v. Ram Shanker* (1904) 26 All. 215.

(d) *Loke Nath v. Keshab Ram* (1886) 13 Cal. 147, 154.

(h) *Wamanrao v. Rustomji* (1897) 21 Bom. 701.

(e) *Neti Rama v. Venkatacharu*

Where no right to further relief shown.—Under s. 15 of the Code of Civil Procedure, 1859, it was held that a declaratory decree could not be made unless there was a right to consequential relief capable of being had in the same Court or in some cases in some other Court, *e.g.*, a Revenue Court (*i*). Under the present section a suit would lie for a merely declaratory decree, though no consequential relief could be claimed, *e.g.*, a suit by an owner of land against any member of the public who formally claims to use such land as a public road and who thereby endangers the title of the owner (*j*), or a suit for a declaration that the defendant is not the plaintiff's son (*k*).

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Reversionary heir.—The next reversioner for the time being to the estate of a deceased Hindu, expectant upon the widow's death, may sue the widow and an alienee of the estate from her for a declaration that the alienation made by her is void beyond the widow's lifetime [ill. (e)]. He may also sue the widow and a son adopted by her for a declaration that the adoption is invalid [ill. (f)]. But the mere fabrication by a widow of a document purporting to be an authority to her from her husband to adopt does not entitle him to claim a declaration that the document is fabricated. "The deed of authority by itself cannot affect the plaintiff's right to any property, though the further act of adoption in pursuance of the authority would. The authority is not the proximate cause of any injury to the plaintiff's rights" (*l*).

The next reversioner may also sue the widow to restrain her from wasting her husband's estate [s. 54, ill. (m)]. But when he sues the widow alleging waste, and fails to prove any wrongful act on her part, he is not entitled to a mere declaration that he is the next reversionary heir. Such a declaration is unavailing as well as premature (*m*).

See notes below under the head "Contingent interest."

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| (i) <i>Katama Natchiar v. Dorasinga</i> | Mad. 592. |
| (1875) 2 I. A. 169, 187. | (m) <i>Janaki Ammal v. Narayanasami</i> |
| (j) <i>Chuni Lal v. Ram Kishen</i> (1888) | <i>Aiyer</i> (1916) 43 I. A. 207, 39 Mad. 634; |
| 15 Cal. 461 [F. B.]. | <i>Thakurain Jaipal Kunwar v. Bhayu</i> |
| (k) <i>Vaktuba v. Agarsinghi</i> (1910) | <i>Indar Bhadur Singh</i> (1904) 31 I. A. |
| 34 Bom. 676, 681-682. | 67, 70. |
| (l) <i>Sreepada v. Sreepada</i> (1912) 35 | |

S. R. A. Vested interest.—A person having a vested interest, though
S. 42. it be after a series of life-estates, is entitled to maintain a suit under this section against the first life-tenant for a declaration that the first life-tenant has no more than a life-estate and against a transferee of the entire estate from him (n).

Contingent interest.—Both under s. 50 of the Chancery Procedure Act and s. 15 of the Code of Civil Procedure, 1859, it was held that a mere contingent right, which may never have existence, is not sufficient to ground an action for declaration (o). The interest of a Hindu reversioner during the widow's life is future and contingent. Such being the case he could have no right under s. 15 of the Code to sue for a declaration in the widow's lifetime that an alienation made by her of her husband's estate is void beyond the widow's lifetime. But his case was treated as an exception, and it was held that he could maintain such a suit under s. 15 of the Code (p). The words used in the present section are "any person entitled to any right as to any property", and these words, it is submitted, include future and contingent rights, so that a person having only a contingent interest may sue for a declaration under this section, though the Court may in the exercise of its discretion refuse to make a declaration (q). Ills. (e) and (f) to the section support the above view.

III. (c).—This is the case of *Fyfe v. Arbuthnot* (r) except that in that case there was a blank left for the amount. The covenant was contained in a deed of settlement and family arrangement executed by the plaintiff. The Court refused to make a declaration on the ground that the bill was filed prematurely. Lord Cranworth, L.C., said: "I think the plaintiff must take the deed as he has executed it, and if the time should arrive when there shall be any property to which the covenant can apply it can be then decided what is its effect." Apparently the Court may under the present section make the declaration.

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| (n) <i>Ramanand Koer v. Rajunath Koer</i> (1882) 9 I. A. 41, 53, 8 Cal. 769. | L. R. 83. See also <i>Saudagar Singh v. Pardip Singh</i> (1918) 45 I. A. 21, 45 Cal. 510. |
| (o) <i>Lady Langdale v. Briggs</i> (1856) 8 De G. M. & G. 391; <i>Jackson v. Turnley</i> (1853) 1 Drew, 617. | (q) See the <i>Bombay Burma Trading Corporation Ltd. v. Yorke Smith</i> (1893) 17 Bom. 197, 220-221; <i>Bhujendro Bhusan v. Trigunath</i> (1882) 8 Cal. 761, 765. |
| (p) <i>Ieri Dutt Koer v. Hansbutti Koerain</i> (1883) 10 I. A. 150, 155-156, 10 Cal. 324; <i>Kathama Nalchiar v. Dorasinga</i> (1875) 2 I. A. 169, 191, 15 Beng. | (r) (1857) 1 De G. & J. 406. |

43. A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees.

Effect of declaration.

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Illustration.

A, a Hindu, in a suit to which B., his alleged wife, and her mother, are defendants, seeks a declaration that his marriage was duly solemnized and an order for the restitution of his conjugal rights. The Court makes the declaration and order. C., claiming that B. is his wife, then sues A. for the recovery of B. The declaration made in the former suit is not binding upon C.

See the Code of Civil Procedure, 1908, s. 11.

CHAPTER VII.

OF THE APPOINTMENT OF RECEIVERS.

Appointment of Receivers discretionary.

44. The appointment of a Receiver pending a suit is a matter resting in the discretion of the Court.

Reference to Code of Civil Procedure.

The mode and effect of his appointment, and his rights, powers, duties and liabilities, are regulated by the Code of Civil Procedure (s).

CHAPTER VIII.

OF THE ENFORCEMENT OF PUBLIC DUTIES.

Power to order public servants and others to do certain specific acts.

45. Any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction,

S. R. A. by any person holding a public office, whether of a
S. 45. permanent or a temporary nature, or by any corporation or inferior Court of Judicature :

Provided—

- (a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act ;
- (b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character ;
- (c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice ;
- (d) that the applicant has no other specific and adequate legal remedy ; and
- (e) that the remedy given by the order applied for will be complete.

Exemptions from
such power.

Nothing in this section shall be deemed
to authorize any High Court—

- (f) to make any order binding on the Secretary of State for India in Council, on the Governor General in Council, on the Governor of Madras in Council, on the Governor of Bombay in Council, or on the Lieutenant-Governor of Bengal ;
- (g) to make any order on any other servant of the Crown, as such, merely to enforce the satisfaction of a claim upon the Crown ; or
- (h) to make any order which is otherwise expressly excluded by any law for the time being in force.

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Mandamus.—The writ of mandamus (*we command*) is a high prerogative writ of a most extensive remedial nature. In form it is a command issuing in the King's name from the King's Bench division of the High Court of Justice, and directed to any person, corporation, or inferior Court of Judicature requiring him or them to do some thing therein specified which appertains to his or their office, and which the Court holds to be consonant to right and justice (*u*). It is used principally for public purposes, and to compel the performance of public duties. It is, however, also used to enforce private rights when they are withheld by public officers. The conditions under which the writ is issued in England are in substance the same as those set forth in ss. 45 and 46 of the present Act.

Before the passing of the present Act the Supreme Courts, and after they were abolished, the High Courts, had the power to issue the writ of mandamus. This power was taken away by the present Act (s. 50), and a power was conferred instead to issue a peremptory order to do or forbear a specific act (s. 47). But this is a change not so much in substance as in form, and in dealing with applications under the present chapter, the principles applicable to a writ of mandamus should, generally speaking, be followed (*v*).

Scope of the chapter.—The present chapter deals with the enforcement of public duties. S. 45 enables the High Courts of Calcutta, Madras and Bombay to make an order requiring *any specific act* to be done or forborne in the circumstances mentioned in that section. S. 46 provides that the application must be founded on an affidavit of the person injured, stating (1) his right, (2) his demand of justice, and (3) the denial thereof. The *applicant* must be a person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the specific act. *The party against whom the order may be made* must be a public servant, or an inferior Court, or a corporation, upon whom the doing or forbearing of the specific act is clearly incumbent under any law for the time being in force. The Court may in its discretion

(*u*) 3 Bl. Com. 110; Com. Dig.
title "Mandamus".

(*v*) *Provas Chandra Roy, In re*, (1913)
40 Cal. 558, 597.

S. R. A. refuse or grant the application. If the application is granted, a
S. 45. *peremptory order* is issued to do or forhear the act.

High Courts.—The only Courts empowered to make an order under this chapter are the High Courts of Calcutta, Madras and Bombay in the exercise of their ordinary original civil jurisdiction. The High Court of Allahabad has no such jurisdiction, and hence it is not mentioned in s. 45.

Conditions to be satisfied before making an order under section 45—These are set forth in cls. (a) to (e) of the proviso to the section. These conditions are cumulative, so that no order can be made under this section unless they are all satisfied (*w*).

“Requiring a specific act to be done or forborne”.—This section enables the Court to make an order requiring any *specific act* to be done or forborne, and nothing else. It does not empower the Court to make any declaration. Thus the Court has no power under this section to declare that a notification in the Calcutta Gazette notifying that the applicant was debarred from taking part in an examination for a period of five years is illegal and *ultra vires*, or that the Board of Examiners acted illegally in not entertaining his application to appear at the examination (*x*).

The omission of a statutory officer to perform his public duties as to the settlement of the election roll in the manner provided by law is forhearing to do an act within the meaning of this section (*y*). And so is the rejection *malà fide* by a Municipal Corporation of plans for building submitted to the Corporation for their approval (*z*).

Where discretion is vested in a public officer under a statute to do or not to do an act, but the discretion is not an absolute one, it must be exercised within the limits prescribed by the statute. Thus where power is given to the Commissioner of Police under an Act to

(*w*) *Rustom v. Kennedy* (1902) 26 Bom. 396, 404; *Abdul Rasul, In re* (1914) 41 Cal. 518.

(*x*) *Provas Chandra Roy, In re* (1913) 40 Cal. 538. See *Rudra Narain Roy* (1901) 28 Cal. 479, which was a similar case. As to the last case Jenkins, C.J., said in *Provas Chandra Roy's*

case: “I confess I do not understand that decision”: see p. 594 of the Report.

(*y*) *Sen, In the matter of*, (1912) 39 Cal. 598; *In re Surendra Chandra Ghose* (1913) 45 Cal. 950.

(*z*) *Provas Chandra De v. Corporation of Calcutta* (1913) 40 Cal. 836, 845.

grant licenses for public conveyances, and it is provided by the Act that the Commissioner may in his discretion refuse to grant any such license for "any conveyance which he may consider to be insufficiently formed or otherwise unfit for the conveyance of the public," "the Commissioner has no power to refuse a license merely because a conveyance does not conform to a particular pattern, and the Court may under this section direct him to issue the license asked for (a). But the Court cannot interfere if the discretion is properly exercised (b).

Person holding a public office.—The syndicate of the Madras University is a statutory body of persons "holding a public office" within the meaning of this section though no emoluments are attached to that office. The High Court therefore has the power under this section to entertain an application by a Fellow of the Madras University for an order against the syndicate directing the syndicate to forward to the Government a protest of his under a regulation of the University against a resolution of the senate. The Fellow, as the author of the rejected protest, has a specific right to ask that his protest should be sent to its proper destination, and not the less so because any other member whose protest was rejected would have a similar right (c).

Corporation.—It is doubtful whether a private company is a corporation within the meaning of this section (d).

Inferior Court of Judicature.—The High Court of Bombay has the power under this section to direct the Chief Judge of the Small Causes Court at Bombay to do a specific act, the latter Court being an inferior Court within the local limits of the ordinary original civil jurisdiction of the High Court. Thus where in a Municipal election case the Chief Judge of the Small Causes Court, thinking that he had no jurisdiction, declined to inquire into the claims of certain candidates, the High Court directed him to proceed with the

(a) *Gell v. Taja Noora* (1903) 27 40 Mad. 125. See also *Gammeter v. The Controller of Patents and Designs* Bom. 307.

(b) *Haji Ismail v. The Municipal* (1918) 45 Cal. 606, at pp. 610-612, 616.

Commissioner (1904), 28 Bom. 253 (d) *Gilbert, Ex parte*, (1892) 16 Bom. [license to keep buffaloes]. 398, 401.

(c) *Nateagn, In the matter of*, (1917)

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S. 45.

enquiry (e). Similarly in a Calcutta case the High Court directed a Presidency Magistrate to furnish a prosecutor whose complaint had been dismissed with copies of the order made by the Magistrate and of the depositions taken before him (f).

Personal right.—The privilege which a member of a Corporation has to inspect the documents of the Corporation is confined to cases where the member has in view *some definite right or object of his own* and to those documents which would tend to illustrate such right or object. No order, therefore, can be made under this section where the applicant has no special interest in any of the matters complained of by him, or any interest other than, or different from, that of each member of the Corporation, and he has no definite right or object of his own to aid or serve in asking for inspection of the Corporation's register, or right or object which the register would illustrate, but, on the contrary, his object is to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the Corporation's affairs (g).

The right of an individual to have a license granted to him for an eating-house under an Act by the Commissioner of Police, the Commissioner having no discretion to refuse the license, is a "personal right" within the meaning of this section, and the refusal to grant the license is an injury to such right (h).

A person who has been provisionally appointed a lecturer of a University has no "personal right" such as would entitle him to apply under this section for an order directing the senate of the University to continue him in the appointment as a lecturer (i).

Clearly incumbent under any law for the time being in force.—No order can be made under this section unless the doing or forbearing an act is, under any law for the time being in

(e) *Sarafally Mamooji, In the matter of*, (1910) 34 Bom. 659.

ors' Co. (1831) 2 B. & Ad. 115.

(f) *Bank of Bengal v. Dinonath Roy* (1882) 8 Cal. 166.

(h) *Rustom v. Kennedy* (1902) 26 Bom. 396.

(g) *Bank of Bombay v. Suleman Samji* (1908) 35 I. A. 130, 135-138, 32 Bom. 476, 478; *Rex v. Merchant Tail-*

(i) *Abdul Rasool, In re.* (1914) 41 Cal. 518 [when there was a bare recommendation and not even a provisional appointment].

force, clearly incumbent upon the party to be affected thereby. To determine whether it is incumbent or not, regard must be had to the provisions of the Act under which it is alleged the act ought to have been done or forborne (j). Regulations made under an Act, where the making of such regulations is authorized by the Act, are "law" within the meaning of this section (k).

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Sa. 48,

Other specific and adequate legal remedy.—No order can be made under this section if there be other specific and adequate legal remedy. Thus an order cannot be made under this section directing the directors of a Company to register the applicant's name as a shareholder, as a specific and adequate remedy is afforded by the Companies Acts (l). Similarly no order can be made under this section where the applicant has the ordinary legal remedy of an execution (m).

46. Every application under section 45 must be founded on an affidavit of the person injured, stating his right in the matter in question, his demand of justice and the denial thereof; and the High Court may, in its discretion, make the order applied for absolute in the first instance, or refuse it, or grant a rule to show cause why the order applied for should not be made.

If in the last case, the person, Court or corporation complained of shows no sufficient cause, the High Court may first make an order in the alternative, either to do or forbear the act mentioned in the order, or to signify some reason to the contrary and make an answer thereto by such day as the High Court fixes in this behalf.

(j) *Mutty Lall Ghose, In the matter of* 40 Mad. 125.
of, (1892) 19 Cal. 192; *Corkhill, In the matter of*, (1895) 22 Cal. 717; *Bholaram v. The Corporation of Calcutta* (1909) 36 Cal. 671.
 (l) *Gilbert, Ex parte* (1892) 16 Bom. 398.
 (m) *Kesho Prasad v. The Board of Revenue* (1911) 38 Cal. 553.
 (k) *Natesan, In the matter of* (1917)

B. R. A.
S. 47-51.

47. If the person, Court or corporation to whom or to which such order is directed makes no answer, or makes an insufficient or a false answer, the High Court may then issue a peremptory order to do or forbear the act absolutely.

48. Every order under this chapter shall be executed, and may be appealed from, as if it were a decree made in the exercise of the ordinary original civil jurisdiction of the High Court.

49. The costs of all applications and orders under this Chapter shall be in the discretion of the High Court.

50. Neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*.

See notes to s. 45, "*Mandamus*," p. 965 above.

51. Each of the said High Courts shall, as soon as conveniently may be, frame rules to regulate the procedure under this Chapter; and, until such rules are framed, the practice of such Court as to applications for and grants of writs of *mandamus* shall apply, so far as may be practicable, to applications and orders under this Chapter.

PART III.

OF PREVENTIVE RELIEF.

Introduction to Part III.—It is not practicable here, and it would be unprofitable for any reasonable Indian purpose if it were practicable, to enlarge on the law and practice of injunctions in England (n). The governing principles, however, are fairly simple,

(n) A convenient summary is given 1907; for a shorter statement see in *Encycl. Laws of England*, 2nd ed., Pollock on Torts, 10th ed., 201-2.

and the nice questions formerly raised by the jurisdiction being confined to courts of equity are now matter of the past. An injunction is a specific order of the Court forbidding the commission of a wrong threatened, or the continuance of a wrongful course of action already begun, or in some cases (when it is called a mandatory injunction) commanding active restitution of the former state of things. Obedience to a negative injunction, however, may in fact involve much more than simple forbearance, for example where the execution of necessary public works in a particular way is restrained as being a nuisance, and an alternative way free from that objection has to be found. Disobedience to an injunction is punishable as contempt of Court by imprisonment in the case of a natural person and sequestration in the case of a corporation or quasi-corporate body.

An injunction will not be granted where there is an adequate remedy in damages. This rule is parallel to that which, as we have seen, limits the remedy of specific performance : it does not apply to the protection of purely equitable rights (in the technical English sense of equity jurisdiction), for the plain reason that for violation of such rights there could be no damages at all, the Court of Chancery having no power to award them. Subject to this rule the remedy is said, like that of specific performance, to be discretionary ; but, the parallel still holding, this does not prevent constant practice from having made it really matter of right in its most important and usual applications. Where a continuing nuisance is proved to violate an established legal right, the Court cannot refuse an injunction merely on its own estimate of the balance of convenience in the particular case. Accordingly in a large proportion of the reported decisions it will be found that the real matter in dispute was not the propriety of the remedy, but the legal recognition of the right said to be infringed, or the validity of some justification or excuse set up in defence. Such cases do not only concern procedure, but belong not less to the substantive law of the classes of rights involved. The illustrations to s. 54 of our Act will offer examples to the judicious reader. In practice the points of law may be and often are inextricably mixed with controversy about the facts, which is rather apt to take the form of conflict between expert witnesses ; and many of the reports are valuable chiefly as exhibiting the manner

S. R. A. Part III. in which the Court applies the settled law to disputes of fact in more or less novel circumstances.

The special application of this remedy to obligations undertaken by contract has given rise to some trouble in England. If A. has expressly agreed with B. *not to do a certain thing*—not to compete with him in his business for a limited time after leaving his employment, to take one common example—if the agreement is enforceable by law, and if damages would not be an adequate remedy to B. for a continuing breach of this agreement, then the Court will protect B. by restraining A. from acting in defiance of his contract (o). So far there is no serious difficulty. But an undertaking to forbear is not necessarily expressed in negative terms. A. covenants that *he will take all the electrical energy he requires* from the X. Co., at a specific price (or scale of prices) and with various ancillary conditions. Read according to its strict affirmative tenor, this is an idle agreement, for A. is not bound to take any current at all from the X. Co. To make it significant and really operative as intended, it must be read as an undertaking by A. not to take electrical energy from any other source of supply (p). This, again, is only matter of reasonable construction. But there may be a *negative undertaking coupled with a positive contract* of a kind which the Court will not—because it cannot completely or equitably enforce by specific performance, such as a contract for skilled personal services. If the Court cannot compel Z. to act or sing, to paint a picture, or manage a technical business for A., will it restrain him from doing for B. that which he has promised but refuses to do for A.? After some hesitation this was answered in the affirmative (q). But then, must such a negative undertaking be express? That it need not be in grammatically negative terms is obvious; to hold to the mere verbal form would be to save judicial trouble at the expense of justice. But a contract to serve A. for a certain time is not, without more, a contract not to serve

(o) 'If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done.... it is the specific performance, by the Court, of the negative bargain which the parties have made': Lord Cairns, *Doherty v. Allman* (1878 3 App. Ca. 709, 720).

(p) *Metrop. Electric Supply Co. v. Ginder* [1901] 2 Ch. 799.

(q) *Lumley v. Wagner* (1852) 1 D. M. G. 604, 91 R. R. 193.

any one else. For a time it seems as if the law would go further, and from a contract for specially skilled service extending over a certain time would imply (and accordingly enforce by injunction) a promise not to render like service elsewhere during that time. The Specific Relief Act was framed when authority to that effect stood unreversed (r). Some years later, however, the Court of Appeal laid down that even a man's positive contract to give "the whole of his time" to his employer does not import a negative undertaking on which an injunction can be grounded. "Every agreement to do a particular thing in one sense involves a negative. It involves the negative of doing that which is inconsistent with the thing you are to do. . . . but it does not at all follow that, because a person has agreed to do a particular thing, he is therefore to be restrained from doing everything else which is inconsistent with it. The Court has never gone that length, and I do not suppose that it ever will" (s). This is the present law of English courts and of jurisdictions where English decisions are followed (t); but the law of British India, fixed by the Specific Relief Act before it was so settled, is otherwise, as appears by illustration (d) to sec. 57, though the text is not quite so explicit, and by the decisions rendered under that section. Such divergences are unfortunate; there is no doubt that the intention of the Specific Relief Act was to reproduce English law. But, in the absence of any provisions for the periodical revision of codifying Acts, it is inevitable that they should sometimes occur.

No further special comment from an English point of view, beyond notes on the illustrations, appears to be called for.

52. Preventive relief is granted at the discretion of the Court by injunction, temporary or perpetual.

Preventive relief
how granted.

(r) *Montague v. Flockton* (1873) L. R. 16 Eq. 189, overruled by *Whitwood Chemical Co. v. Hardman* (see next note).

(s) *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416, 426, per Lindley, L.J.

(t) The opinion expressed in the current edition (1911) of Fry on Specific

Performance, § 862, is "that negative stipulations will not be implied except in the cases where the Courts have already done so: and that even the presence of an express negative stipulation will not be found a sufficient ground for jurisdiction unless the contract is of a kind of which specific performance can be granted"

S. R. A.
s. 52-54.

"At the discretion of the Court".—"The right to an injunction depends in India upon statute and is governed by the provisions of the Specific Relief Act (I of 1877). Sec. 52 of that Act places the grant of an injunction in the discretion of the Court—a discretion to be exercised of course as the discretion of Courts always is" (u). "The discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Appeal" (see s. 22 above).

53. Temporary injunctions are such as are to continue until a specified time, or until the further order of the Court. They may be granted at any period of a suit, and are regulated by the Code of Civil Procedure.

Perpetual injunctions. A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit: the defendant is thereby perpetually enjoined from the assertion of a right, or from the commission of an act, which would be contrary to the rights of the plaintiff.

Temporary injunctions.—See the Code of Civil Procedure, 1908, O. 39.

CHAPTER X.

OF PERPETUAL INJUNCTIONS.

54. Subject to the other provisions contained in, or referred to by, this Chapter, a perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication.

When such obligation arises from contract, the Court shall be guided by the rules and provisions contained in Chapter II of this Act.

(u) *Tituram v. Cohen* (1905) 32 I. A. 185, 192, 33 Cal. 203, 218

When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the Court may grant a perpetual injunction in the following cases (namely):—

- (a) where the defendant is trustee of the property for the plaintiff;
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (c) where the invasion is such that pecuniary compensation would not afford adequate relief; (w).
- (d) where it is probable that pecuniary compensation cannot be got for the invasion;
- (e) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

EXPLANATION.—For the purpose of this section a trade-mark (x) is property.

Illustrations.

[Most of the points here illustrated are now elementary in English law.]

(a) A. lets certain land to B., and B. contracts not to dig sand or gravel thereout. A. may sue for an injunction to restrain B. from digging in violation of his contract.

(b) A trustee threatens a breach of trust. His co-trustees, if any, should, and the beneficial owners may, sue for an injunction to prevent the breach.

(c) The Directors of a public company are about to pay a dividend out of capital or borrowed money. Any of the shareholders may sue for an injunction to restrain them (y).

(w) The suggestion in *Boyson v. Deane* (1899) 22 Mad. at p. 255, that this principle is not regarded in English doctrine, is erroneous. What is true is that for a continuing nuisance damages are not presumed to be an adequate remedy.

(x) As to the law relating to trade-

marks, see ss. 478-489 of the Indian Penal Code (Act XLV of 1860).

(y) As to payment of interest out of capital by Railway Companies during construction, see s. 3 of the Indian Railway Companies Act, 1895 (X of 1895).

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(d) The Directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

(e) A., an executor, through misconduct or insolvency, is bringing the property of the deceased into danger. The Court may grant an injunction to restrain him from getting in the assets.

(f) A., a trustee for B., is about to make an imprudent sale of a small part of the trust property. B. may sue for an injunction to restrain the sale, even though compensation in money would have afforded him adequate relief.

(g) A. makes a settlement (not founded on marriage or other valuable consideration) of an estate on B. and his children. A. then contracts to sell the estate to C. B. or any of his children may sue for an injunction to restrain the sale.

(h) In the course of A.'s employment as a vakil, certain papers belonging to his client, B., come into his possession. A. threatens to make these papers public, or to communicate their contents to a stranger. B. may sue for an injunction to restrain A. from so doing.

(i) A. is B.'s medical adviser. He demands money of B. which B. declines to pay. A. then threatens to make known the effect of B.'s communications to him as a patient. This is contrary to A.'s duty, and B. may sue for an injunction to restrain him from so doing.

(j) A., the owner of two adjoining houses, lets one to B. and afterwards lets the other to C. A. and C. begin to make such alterations in the house let to C. as will prevent the comfortable enjoyment of the house let to B. B. may sue for an injunction to restrain them from so doing.

(k) A. lets certain arable lands to B. for purposes of husbandry, but without any express contract as to the mode of cultivation. Contrary to the mode of cultivation customary in the district, B. threatens to sow the lands with seed injurious thereto and requiring many years to eradicate. A. may sue for an injunction to restrain B. from sowing the lands in contravention of his implied contract to use them in a husband like manner.

[*Pratt v. Brett* (1817) 2 Madd. 62, 17 R. R. 187, apparently undefended.]

(l) A., B. and C. are partners, the partnership being determinable at will. A. threatens to do an act tending to the destruction of the partnership property. B. and C. may, without seeking a dissolution of the partnership, sue for an injunction to restrain A. from doing the act.

[*Miles v. Thomas* (1839) 9 Sim. 606, 47 R. R. 320: injunction refused on other grounds.]

(m) A., a Hindu widow in possession of her deceased husband's property, commits destruction of the property without any cause sufficient to justify her in so doing. The heir-expectant may sue for an injunction to restrain her.

(n) A., B. and C. are members of an undivided Hindu family. A. cuts timber growing on the family property, and threatens to destroy part of the

family-house and to sell some of the family-utensils. B. and C. may sue for an injunction to restrain him.

(o) A., the owner of certain houses in Calcutta, becomes insolvent. B. buys them from the Official Assignee and enters into possession. A. persists in trespassing on and damaging the houses, and B. is thereby compelled, at considerable expense, to employ men to protect the possession. B. may sue for an injunction to restrain further acts of trespass.

(p) The inhabitants of a village claim a right of way over A.'s land. In a suit against several of them, A. obtains a declaratory decree that his land is subject to no such right. Afterwards each of the other villagers sues A. for obstructing his alleged right of way over the land. A. may sue for an injunction to restrain them.

(q) A., in an administration-suit to which a creditor, B., is not a party, obtains a decree for the administration of C.'s assets. B. proceeds against C.'s estate for his debt. A. may sue for an injunction to restrain B.

(r) A. and B. are in possession of contiguous lands and of the mines underneath them. A. works his mine so as to extend under B.'s and threatens to remove certain pillars which help to support B.'s mine. B. may sue for an injunction to restrain him from so doing.

(s) A. rings bells or makes some other unnecessary noise so near a house as to interfere materially and unreasonably with the physical comfort of the occupier, B. B. may sue for an injunction restraining A. from making the noise.

[*Salter v. De Hald* (1854) 2 Sim. N. S. 133, 89 R. R. 245.]

(t) A. pollutes the air with smoke so as to interfere materially with the physical comfort of B. and C., who carry on business in a neighbouring house. B. and C. may sue for an injunction to restrain the pollution.

(u) A. infringes B.'s patent. If the Court is satisfied that the patent is valid and has been infringed, B. may obtain an injunction to restrain the infringement.

(v) A. pirates B.'s copyright. B. may obtain an injunction to restrain the piracy, unless the work of which copyright is claimed is libellous or obscene.

(w) A. improperly uses the trade-mark of B. B. may obtain an injunction to restrain the user, provided that B.'s use of the trade-mark is honest.

(x) A., a tradesman, holds out B. as his partner against the wish and without the authority of B. B. may sue for an injunction to restrain A. from so doing.

[*Routh v. Webster* (1847) 10 Beav. 561, 76 R. R. 211; *Waller v. Ashton* [1902] 2 Ch. 282; *Burchell v. Wille* [1900] 1 Ch. 551, 563.]

(y) A., a very eminent man, writes letters on family-topics to B. After the death of A. and B., C., who is B.'s residuary legatee, proposes to make money by publishing A.'s letters. D., who is A.'s executor, has a property in the letters, and may sue for an injunction to restrain C. from publishing them.

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[A.'s eminence is immaterial. Questions on the right to publish or restrain the publication of letters formerly gave much trouble in England. See now Robertson on copyright (1912) 133.]

(z) A. carries on a manufactory and B. is his assistant. In the course of his business, A. imparts to B. a secret process of value. B. afterwards demands money of A., threatening, in case of refusal, to disclose the process to C., a rival manufacturer. A. may sue for an injunction to restrain B. from disclosing the process.

Discretion as to granting injunctions.—Injunctions are of two kinds, namely, (1) temporary, and (2) perpetual. Temporary injunctions are dealt with in O. 39 of the Code of Civil Procedure. Perpetual injunctions are dealt with in ss. 54 to 57 of the present Act. Whether the injunction sought is temporary or perpetual, the jurisdiction to grant is, as in the case of specific performance (s. 22), discretionary (z). See s. 52 above, and the notes thereto.

Perpetual injunctions.—"The granting of injunctions is now regulated by ss. 54 and 55 of the Specific Relief Act. But those sections have never been understood as introducing new principles of law in India, but rather as an attempt to express in general terms the rules acted upon by Courts of Equity in England, and long since introduced in this country, not because they were English law, but because they were in accordance with equity and good conscience" (a).

A perpetual injunction may be granted to prevent the breach of an obligation existing in favour of the applicant, whether expressly or by implication. The obligation may arise from contract as in ill. (a), or it may be in the nature of a trust (as defined in section 3) as in ill. (b) to (h), or it may be an obligation the breach of which amounts to a tort or civil wrong of which ill. (s) and (t) are prominent instances, or it may be any other legal obligation as in ill. (i) and (z). As regards contracts the Court is to be guided, in granting an injunction, by the rules in Chapter II as to specific performance. Where there is an invasion of the plaintiff's right to, or enjoyment of, property, an injunction may be granted only in the five cases mentioned in cls. (a) to (e) of the third paragraph. Where a breach of trust is

(z) *Tiluram v. Cohen* (1905) 32 I. A. 185, 33. Cal. 203.

(a) *Shamnugger Jute Factory Co. v. Ram Narain* (1887) 14 Cal. 189, 190.

threatened, the Court may grant an injunction, even though compensation in money would afford adequate relief [ill. (f)]; this follows from cl. (a) of the third paragraph. S. R. A.
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Injunction to prevent breach of contract.—By the second paragraph of this section it is provided that in dealing with cases of injunctions to prevent the breach of a contract, the Court is to be guided by the rules in Chapter II relating to specific performance. By s. 56, cl. (f), it is again enacted that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. By s. 57 it is provided that notwithstanding s. 56, cl. (f), the Court may in certain cases grant an injunction. These cases are dealt with in the notes to s. 57.

Ill. (a) to the present section is a case in which the Court will grant an injunction to restrain the breach of the contract, as not amount of pecuniary compensation would afford adequate relief to the plaintiff if the contract is broken.

Amongst contracts of which the breach may not be prevented by an injunction are contracts which are dependant on the personal qualifications or volition of the parties. These contracts will not be specifically enforced [s. 21, cl. (b)], and an injunction will not be granted to prevent the breach thereof. Acting upon these principles, the Courts have refused to restrain employers from determining contracts with their employees where the services to be rendered by the latter were services of a personal nature, *e.g.*, a contract to work a railway line and keep the engines and rolling plant in repair (b), a contract to act as a manager of a tea estate (c), a contract to manage the business of working certain patents (d), a contract to act as agents of a company (e), a contract to act as manager of trust properties (f).

The Court will not enforce specific performance of a contract which is made under such circumstances as to give the plaintiff an unfair advantage over the defendant (s. 22); it will

(b) *Johnson v. The Shrewsbury and* L. J. Ch. 409.

Birmingham Ry. Co. (1853) 3 De G. M. & G. 914.

(c) *Nusserwanjee v. Gordon* (1882) 6 Bom. 266, 283.

(c) *Mair v. Himalaya Tea Co.* (1865) L. R. 1 Eq. 411.

(f) *Ram Charan v. Bakhal Das* (1914) 41 Cal. 19.

(d) *Stocker v. Brocklebank* (1850) 20

- S. R. A. therefore also refuse to grant an injunction to prevent the breach
 S. 54. of the contract (g).

Where the case is such that the Court will not enforce specific performance of a contract or prevent its breach by an injunction, it will not restrain the party committing the breach from doing that which is only a violation of what is ancillary or incidental to the principal part of the contract. Thus a Court will not, either by decreeing specific performance or by injunction, compel a company to retain its agents in its employ; so it will not restrain the company from appointing a solicitor, though under the terms of the contract between the company and its agents the agents alone have the right to appoint solicitors for the company (h).

Right to, or enjoyment of, property.—It is not in every case where the plaintiff's right to property is invaded that a perpetual injunction will be granted. Such injunction may be granted only in the cases mentioned in cls. (a) to (e) of the third paragraph. Of these cls. (a) to (d) are similar to cls. (a) to (d) of s. 12 which relate to specific performance.

“Property”.—A trademark is property for the purposes of this section [see *Explanation* and ill. (w) J. The right of a *gor* (priest) to conduct his *yajmans* (patrons) to a temple and perform worship there on his behalf and receive remuneration for his services is a right to the enjoyment of property; if the right is invaded, the Court will grant an injunction, the invasion being such that pecuniary compensation would not afford adequate relief (i). A plaintiff holding a sanad from Government in which he is described as *vicharanakarta* of Tirumalai and Tirupati temples, *vagaira* (and others), the expression “*vagaira*” including some thirty minor temples, may obtain an injunction restraining the defendant who is a *dharma* *makarta* of the said two temples and of three minor ones only from using a seal bearing on it the words “Tirumalai, Tirupati *vagaira* *devastanam dharma* *makarta*”; though the plaintiff has no property in the word “*vagaira*,” it connotes an extension of the defendant's rights as *dharma* *makarta* to which he has no title, and it invades, or, threatens

(g) *Callingi v. Narsi* (1895) 19 Bom. 764.

(h) (1882) 6 Bom. 266, 283-284.

(i) *Kalidas v. Parjaram* (1891) 15 Bom. 309; *Moro v. Anant* (1897) 21 Bom. 821.

to invade, the plaintiff's rights in respect of the minor temples of which the defendant claims to be, but is not, dharmakarta (j). S. R. A. S. 54.

Easement of light and air.—Where an easement of light and air is disturbed, an injunction will be granted only where the invasion of the right is such that pecuniary compensation would not afford adequate relief (k). Where the disturbance is such as to render the plaintiff's house useless for the business carried on by the plaintiff in the house, the case is one for a perpetual injunction (l).

Continuing trespass.—Repeated violation of a person's right to property cannot in ordinary cases be adequately met by damages, nor can these damages be satisfactorily ascertained. In such a case the appropriate remedy is a perpetual injunction (m); see ill. (c).

Co-sharers, landlord and tenant, etc.—The Court will grant a perpetual injunction to restrain one of several co-sharers from appropriating to himself land in which each of his co-sharers has an interest and from building upon it, and if he has proceeded to build upon it, the Court will grant a mandatory injunction under s. 55 directing that the building so far as it has proceeded be pulled down (n). But there is no such broad proposition as that one co-owner is entitled to an injunction restraining another co-owner from exceeding his rights absolutely, and without reference to the amount of damage to be sustained by the one side or the other from the granting or withholding of the injunction (o). Injunction in the case of co-owners is granted where the act complained of amounts to waste of the joint property or to an illegitimate use thereof or to ouster of the plaintiff from possession and enjoyment of the property (p). The closing of the door of a staircase which affords access to the roof (q), or of a

(j) *Nadagopu v. Rama Kisore* (1899) 22 Mad. 189.

(k) *Dhunjibhoy v. Lisboa* (1889) 13 Bom. 252; *Sultan Nawaz Jung v. Rustonji Nanabhoy* (1896) 20 Bom. 704; *Ghanasham v. Moroba* (1894) 18 Bom. 474. See also *Paul v. Robeson* (1914) 41 L. A. 180, 42 Cal. 46.

(l) *Yaro v. Sana-Ullah* (1897) 19 All. 259.

(m) *Apaj v. Apu* (1902) 26 Bom. 735.

(n) *Shadi v. Anup Singh* (1890) 12 All. 436 [F. B.]. See also *Shamnagger Jute Factory Co. v. Ram Narain* (1887) 14 Cal. 189, 198-199.

(o) *Shamnagger Jute Factory Co. v. Ram Narain* (1887) 14 Cal. 189, 200-201.

(p) *Anant v. Gopal* (1895) 19 Bom. 269, 270.

(q) *Soshi Bhawan v. Gonesh Chunder* (1902) 29 Cal. 500.

- S. R. A. door which affords the only access to the portion in the plaintiff's
 s. 54. occupation (r), is an act amounting to an ouster, and it may be prevented by a perpetual injunction. But the mere fact that a tank has been excavated by the defendant on a portion of the joint land and that a part thereof was fit for cultivation, does not constitute such an injury as would justify an order directing the defendant to refill the tank (s).

It is a settled rule of law that no tenant, whether he has an occupancy right or not, is at liberty to erect houses upon agricultural holdings for other than agricultural purposes and thereby to alter the character of the holding. If he does erect a house for other than agricultural purposes, the Court will grant an injunction restraining him from altering the character of the land, and it will also grant a mandatory injunction under s. 55 directing him to remove the building (t). Where land has been let out for agricultural purposes generally, the erection of an indigo factory on any part of such land renders it unfit for the purposes of the tenancy, and the landlord may obtain a perpetual injunction restraining the tenant from erecting the factory (u) : see ill. (k).

Nuisance.—As regards nuisance, where it is of the kind to injure the health or seriously imperil the life of those complaining of it, the Court will not hesitate to prevent it by way of injunction. But where it goes no further than to diminish the comforts of human life, there will always be a question whether the Court will proceed against him who causes that nuisance by injunction or compensate the sufferer in damages (v). See ill. (s) and (t). But an injunction cannot be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance [s. 56, cl. (g)]. The Court will not grant an injunction in a mere *quia timet* action, where there is no proof of injury having occurred and no well-founded and reasonable apprehension of

(r) *Anant v. Gopal* (1895) 19 Bom. 269. (u) *Suvendra Narain v. Hari Mohan*
 (s) *Joy Chunder v. Bipro Churn* (1887) (1904) 31 Cal. 174.
 14 Cal. 236, following (1887) 14 Cal. (v) *Bhicaiji v. Pirojshaw* (1916) 40
 189, *supra*. Bom. 401; *The Land Mortgage Bank of*
 (t) *Ramanadhan v. Zamindar of India v. Ahmedbhai Habibbhai* (1884) 8
Rannad (1893) 16 Mad. 407. Bom. 35, 91-92.

injury* in the near future, but merely an apprehension which may or may not be well-founded (re). S. R. A.
Ss. 54, 55.

Breach of Trust.—See ills. (b) to (h). As to definition of “trust,” see s. 3 above.

Waste.—See ills. (l), (m), and (n).

Patent, copyright and trade mark.—See ills. (l), (v) and (w) to this section, and ill. (g) to s. 55.

“Invadee or threatens to invade.” An injunction may be sued for to restrain a defendant from doing an act which threatens injury to the plaintiff’s property, although no such injury has actually ensued. It must, however, be shown that injury will be the inevitable result; it will not do to say that injury may be the result (x): see ill. (r). See notes above, “Nuisance”.

• *Multiplicity of judicial proceedings.*—Clause (e) has reference to cases where unless an injunction was granted, the plaintiff would have to bring repeated suits or to make repeated applications or to take repeated proceedings for the purpose of establishing or safeguarding his rights, or of preventing the acquisition of rights by the defendant (y). For instances of this class, see ills. (p) and (q).

Damages for future injury.—It is doubtful whether the Court has jurisdiction to award damages by way of compensation for an injury not yet committed, but only threatened and intended (z).

55. When to prevent the breach of an obligation, it is necessary to compel the performance of certain acts which the Court is capable of enforcing, the Court may in its discretion grant an injunction to prevent the breach complained of, and also to compel performance of the requisite acts.

Mandatory
injunctions.

Illustrations.

(a) A., by new buildings, obstructs lights to the aerse and use of which B. has acquired a right under the Indian Limitation Act (a), Part IV. B.

(w) *Fletcher v. Bealey* (1885) 28 Ch. Bom. 735, 739 (repeated trespass); *The Land Mortgage Bank of India v. Ahmed.*
D. 688.

(x) *Pattisson v. Gifford* (1874) L. R. 18 bhoy Habibbhooy (1884) 8 Bom. 35, 91-92
Eq. 250; *Bindu v. Jahnabi* (1897) 24 [nuisance].

Cal. 260. (z) See *Martin v. Price* [1894] 1 Ch.

(a) *Karnadhor v. Hariprasad* (1910) 276, 284.
37 Cal. 732, 734; *Apaji v. Apa* (1903) 26 (a) Act IX of 1908.

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may obtain an injunction, not only to restrain A. from going on with the buildings, but also to pull down so much of them as obstructs B.'s lights.

(b) A. builds a house with eaves projecting over B.'s land. B. may sue for an injunction to pull down so much of the eaves as so project.

(c) In the case put as illustration (i) to section 54, the Court may also order all written communications made by B., as patient, to A., as medical adviser, to be destroyed.

(d) In the case put as illustration (y) to section 54, the Court may also order A.'s letters to be destroyed.

(e) A. threatens to publish statements concerning B. which would be punishable under Chapter XXI of the Indian Penal Code (b). The Court may grant an injunction to restrain the publication, even though it may be shown not to be injurious to B.'s property.

(f) A., being B.'s medical adviser, threatens to publish B.'s written communications with him, showing that B. has led an immoral life. B. may obtain an injunction to restrain the publication.

(g) In the cases put as illustrations (v) and (w) to section 54, and as illustrations (e) and (f) to this section, the Court may also order the copies produced by piracy, and the trade-marks, statements and communications, therein respectively mentioned, to be given up or destroyed.

Mandatory injunction—In *Smith v. Smith* (c) Sir G. Jessel. M.R., said: "As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the Judges in some of the cases cited. At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from continuing the nuisance. The Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every judge ought to exercise care, and it is not more needed in one case than in another."

"In looking at the reason of the thing, there is not any pretence for such a distinction as was supposed to exist between this and other forms of injunction. If a man is gradually fouling a stream with sewage, the Court never has any hesitation in enjoining him. What difference could it make if instead of fouling it day by day he stopped it altogether? In granting a mandatory injunction,

(b) Act XLV of 1860.

(c) (1875) L. R. 20 Eq. 500, 594.

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the Court did not mean that the man injured could not be compensated by damages, but that the case was one in which it was difficult to assess damages, and in which, if it were not granted, the defendant would be allowed practically to deprive the plaintiff of the enjoyment of his property if he would give him a price for it. Where, therefore, money could not adequately reinstate the person injured, the Court said, as in cases of specific performance, 'We will put you in the same position as before the injury was done.' When once the principle was established, why should it make any difference that the wrong-doer had done the wrong, or practically done it before the bill was filed? It could make no difference where the plaintiff's right remained and had not been lost by delay or acquiescence."

The granting of a mandatory injunction is a matter in the judicial discretion of the Court (*d*). It is granted generally upon the same principles and subject to the same conditions as a perpetual injunction (*c*). When a mandatory injunction is granted under this section, two elements have to be taken into consideration: in the first place, the Court has to determine what acts are necessary in order to prevent a breach of the obligation: in the second place, the requisite acts must be such as the Court is capable of enforcing (*f*). These acts may assume a variety of forms, *e.g.*, the pulling down of a building as in ill. (a), the pulling down of eaves as in ill. (b), the destruction of written communications and letters as in ill. (c) and (d), and destruction of copies produced by piracy of copyright and of trade-marks improperly used by the defendant as in ill. (v) and (w) of s. 54 and ill. (g) of this section, the removal of trees on the defendant's land, the roots whereof, if the trees be allowed to grow, would inevitably damage the plaintiff's building (*g*), the demolition of a wall constructed by the defendant on land belonging to the plaintiff (*h*). But an injunction will not be granted directing a person to do repairs, the reason being that the Court will not superintend works of building or of repair (*i*).

(*d*) *Shamnugger Jute Factory v. Ram Narain* (1887) 14 Cal. 189, 199-201.

(*c*) *Smith v. Smith* (1875) L. R. 20, Eq. 509.

(*f*) *Lalshmi v. Tara* (1904) 31 Cal. 944., 949.

(*g*) (1904) 31 Cal. 944, *supra*.

(*h*) *Abdul Hossain v. Ram Charan Lave* (1911) 38 Cal. 687.

(*i*) *Attorney-General v. Staffordshire*

County Council [1905] 1 Ch. 336, 342.

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May be granted although act completed.—There is no rule which prevents the Court from granting a mandatory injunction where the injury sought to be restrained has been completed before the action is commenced. A mandatory injunction may be granted even after the injury has been completed, provided the plaintiff has not lost his right to relief by delay or acquiescence (*j*). As regards mandatory injunctions after the act sought to be restrained has been completed, a distinction is drawn between cases of trespass, *e.g.*, laying pipes in the plaintiff's land on the one hand, and cases of ancient lights on the other. In cases of trespass, the fact that the damage suffered by the plaintiff is small is immaterial. In cases of ancient lights the quantum of damage to the plaintiff as compared with the quantum of loss to the defendant, is a material consideration (*k*). Where there is a covenant not to build, and there is a breach of the covenant, the covenantee is entitled to an injunction without the necessity of showing damage (*l*).

Delay and acquiescence.—Delay and acquiescence may deprive a plaintiff of his right to relief by way of mandatory injunction (*m*). "If a party having a right stands by and sees another dealing with the property inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. This is the proper sense of the word acquiescence" (*n*). Mere omission to take any legal proceedings for a time is not in itself an encouragement to the defendant amounting to an equitable bar to

(*j*) *Smith v. Smith* (1875) L. R. 20, Eq. 500 [ancient lights]; *Durell v. Pritchard* (1865) L. R. 1, Ch. 244 [ancient lights]; *Lady Stanley of Alderby v. Earl of Shrewsbury* (1875) 19 Eq. 616 [ancient lights]; *Argenwood v. Hornsey* (1886) 33 Ch. D. 471; *Krehl v. Burrell* (1877) 7 Ch. D. 551, (1879) 11 Ch. D. 146 [obstruction to right of way]; *Jammadas v. Atmarum* (1878) 2 Bom. 133, 137-139.

(*k*) *Goodson v. Richardson* (1874) 9 Ch., App. 221, 224, 225 [trespass]; *Mariott v. East Grinstead Gas & Water Co.* [1909] 1 Ch. 70, 79 [trespass]; *Smith v. Smith* (1875) L. R. 20 Eq. 500, 505 [ancient lights]; *Senior v. Pardson*

(1866) L. R. 3 Eq. 330, 336 [ancient lights].

(*l*) *Lord Manners v. Johnson* (1875) 1 Ch. D. 673 [covenant not to erect building].

(*m*) *Smith v. Smith* (1875) L. R. 20 Eq. 500, 503 [ancient lights]; *Jammadas v. Atmarum* (1878) 2 Bom. 133, 137-139 [ancient lights]; *Haji Abdul Allarakhia v. Haji Abdul Bacha* (1882) 6 Bom. 5, 7.

(*n*) *Duke of Leeds v. Earl of Amherst* (1846) 2 Ph. 117, 123 [equitable waste]; *Abdul Hossain v. Ram Charan Law* (1911) 38 Cal. 687, 692-693 [trespass].

relief (o). The result of authorities on the subject is that where a person had a legal right, it could be destroyed by his acquiescence, that is, if he stood by and allowed his neighbours to incur expenditure in doing what he knew would injure his property. One point for consideration, however, has always been whether the man who did the act knew that he would do the injury (p). If he did know, and must have known, that he was going to do a wrong, it deprives him of one ground of defence (q). It is also to be remembered, where acquiescence is alleged, that where a man has a right to do a thing, and appears to be doing what he has a right to do, you must not assume that he is going to use his right for an unlawful purpose (r). See also notes to s. 22 under the head "Delay."

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Mandatory injunction against co-sharers and tenants. See notes to s. 54 under the head "Right to or enjoyment of property," sub-head "Co-shares, landlord and tenant, etc.," p. 891 above.

Injunction when refused.

56. An injunction cannot be granted

- (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;
- (c) to restrain persons from applying to any legislative body;
- (d) to interfere with the public duties of any department of the Government of India or the Local Government, or with the sovereign acts of a Foreign Government;
- (e) to stay proceedings in any criminal matter;

(o) *Hogg v. Scott* (1874) L. R. 18

(q) *Ib.*, p. 503.

Eq. 444, 454 [copyright]; *Jamnadass v.*

(r) *Attorney-General v. Leeds Corporation*

Atmaram (1878) 2 Bom. 133, 137-139.

(1870) 5 Ch. App. 583, 594 [un-

(p) *Smith v. Smith* (1875) L. R. 20,

sance].

Eq. 500, 503.

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- (f) to prevent the breach of a contract, the performance of which would not be specifically enforced ;
- (g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance ;
- (h) to prevent a continuing breach in which the applicant has acquiesced ;
- (i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding, except in case of breach of trust ;
- (j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court ;
- (k) where the applicant has no personal interest in the matter.

Illustrations.

(a) A seeks an injunction to restrain his partner, B, from receiving the partnership-debts and effects. It appears that A. had improperly possessed himself of the books of the firm and refused B. access to them. The Court will refuse the injunction.

(b) A. manufactures and sells crucibles, designating them as "patent plumbago crucibles," though in fact they have never been patented. B. pirates the designation. A. cannot obtain an injunction to restrain the piracy.

(c) A. sells an article called "Mexican Balm," stating that it is compounded of divers rare essences, and has sovereign medicinal qualities. B. commences to sell a similar article to which he gives a name and description such as to lead people into the belief that they are buying A.'s Mexican Balm. A. sues B. for an injunction to restrain the sale. B. shows that A.'s Mexican Balm consists of nothing but scented hog's lard. A.'s use of his description is not an honest one and he cannot obtain an injunction.

[See *Perry v. Traffitt* (1842) 6 Beav. 66, 63 R. R. 11 ; the facts as stated here are stronger against the plaintiff (s).]

(s) One might think *Tidding v. How* (1837) 8 Sim. 477, 42 R. R. 231, would have furnished an illustration making the point more clear and better suited for exportation to India. There the plaintiff had represented the blend of tea for which he claimed an exclusive trade name as being specially imported from

Scope of the section.—This section gives a list of cases in which a perpetual injunction cannot be granted. It must, however, be remembered that the jurisdiction to grant injunctions is discretionary, and an injunction, therefore, may be refused even if the case be one not covered by the present section.

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Clause (b): stay of proceedings. It is laid down in clause (b) that no injunction to stay proceedings can be granted unless the Court in which the proceedings are to be stayed is subordinate to that in which the injunction is sought. In a case which arose before the passing of the present Act it was held by a Full Bench of the Calcutta High Court that an injunction may be issued against a decree-holder to restrain him from executing a decree, though the Court granting the injunction and the Court passing the decree are Courts of co-ordinate jurisdiction. Such an order it was said is only binding on the decree-holder personally (*l*). See Mulla's Code of Civil Procedure, notes to O. 39, r. 1, "Powers of High Court to stay the hearing of a suit."

In a Madras case the question arose whether an injunction to restrain a decree-holder from executing his decree was an injunction "to stay proceedings" within the meaning of this clause. It was held that it was not, the reason given being that as no application had yet been made for execution, and as none could be made so long as the injunction was in force, there was no pending proceeding that was stayed by the injunction (*u*). But this view has been dissented from by the High Court of Calcutta (*v*), and it is not in accord with later Madras decisions (*w*). There does not seem to be any good reason why the expression "proceedings" in this clause should be confined to proceedings pending in a Court, and why it should not apply to proceedings intended or threatened to be taken by a party. Contrast cl. (a) of the section.

China, whereas in fact it was a mixture of teas purchased in England. Injunction refused with liberty to bring an action at law (the Court of Chancery then and for many years later could not award damages, as explained above in the Introduction to the Specific Relief Act).

(*l*) *Dhuronidhur v. Agra Bank*

(1880) 5 Cal. 86, on review from (1879) 4 Cal. 380, 396.

(*u*) *Appu v. Raman* (1891) 14 Mad. 425, 429-430.

(*v*) *Karnadhar v. Hariprasad* (1910) 37 Cal. 731, 734.

(*w*) *Vankatesu v. Ramasami* (1892) 15 Mad. 338, 341-342; *Sethurayar v. Shanmugam* (1892) 21 Mad. 353.

S. R. A. The rule laid down in cl. (b) does not apply to temporary injunctions which are governed by O. 39 of the Code of Civil Procedure (x).

Clause (f) : injunction to prevent breach of contract.—See notes to s. 54 under the head “Injunction to prevent breach of contract.” p. 979 above.

Clause (g) : nuisance.—See notes to s. 54 under the head “Right to, or enjoyment of, property,” sub-head “Nuisance,” p. 982 above.

Clause (h) : acquiescence.—See notes to s. 22 under the head “Delay,” and notes to s. 55 under the head “Delay and acquiescence.”

Clause (j) : plaintiff's conduct.—An injunction cannot be granted where the plaintiff's conduct is such as to disentitle him to that relief (y). The illustrations to the section relate to this clause.

Clause (k) : personal interest.—Every taxpayer is directly interested in the proper application of Municipal funds. Any taxpayer may therefore sue the Municipality for an injunction restraining the Municipality from misapplying its funds (z).

57. Notwithstanding section 56, clause (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement : provided that the applicant has not failed to perform the contract so far as it is binding on him.

Illustrations.

(a) A. contracts to sell to B. for Rs. 1,000 the good-will of a certain business unconnected with business-premises, and further agrees not to carry on that business in Calcutta. B. pays A. the Rs. 1,000 but A. carries on the business in Calcutta. The Court cannot compel A. to send his customers to B. but B. may obtain an injunction restraining A. from carrying on the business in Calcutta.

(x) *Amir Duhin v Adm. Gen. of Bengal* (1896) 23 Cal. 351. (1897) 20 Mad. 58, 87.

(z) *Yaman v. Municipality of Shola*

(y) *Seeni Chettiar v. Santhanathan pur* (1898) 22 Bom. 646.

(b) A. contracts to sell to B. the good-will of a business. A. then sets up a similar business close by B.'s shop, and solicits his old customers to deal with him. This is contrary to his implied contract, and B. may obtain an injunction to restrain A. from soliciting the customers, and from doing any act whereby their good-will may be withdrawn from B.

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(c) A. contracts with B. to sing for twelve months at B.'s theatre and not to sing in public elsewhere. B. cannot obtain specific performance of the contract to sing, but he is entitled to an injunction restraining A. from singing at any other place of public entertainment.

[*Lumley v. Wagner* (1852) 1 D. M. & G. 604, 91 R. R. 193.]

(d) B. contracts with A. that he will serve him faithfully for twelve months as a clerk. A. is not entitled to a decree for specific performance of this contract. But he is entitled to an injunction restraining B. from serving a rival house as clerk.

[Recent English authorities have distinctly refused to go so far; an affirmative agreement does not of itself imply for this purpose a negative agreement to do nothing inconsistent with it: *Whitehead Chemical Co. v. Hardman* [1891] 2 Ch. 416, 426, 432. Whether an express agreement is affirmative or negative is a matter of substance and not of verbal form: *Metropolitan Electric Supply Co. v. Girder* [1901] 2 Ch. 799.]

(e) A. contracts with B. that, in consideration of Rs. 1,000 to be paid to him by B. on a day fixed, he will not set up a certain business within a specified distance. B. fails to pay the money. A. cannot be restrained from carrying on the business within the specified distance.

Injunction to perform negative agreement.—It is provided by s. 54 that in granting an injunction to prevent the breach of a contract the Court is to be guided by the rules contained in Chapter II relating to specific performance. By s. 56, cl. (f), it is enacted, that an injunction cannot be granted to prevent the breach of a contract the performance of which would not be specifically enforced. The present section provides that notwithstanding s. 56, cl. (f), where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the Court is unable to compel specific performance of the affirmative agreement shall not preclude it from granting an injunction to perform the negative agreement. Thus the contract in *ills. (c)* and *(d)* is one of personal service, and therefore not capable by s. 21, cl. (b), of specific performance, yet the Court may by an injunction restrain the singer from singing at any other place of public entertainment and the clerk from serving a rival house. Similarly where A. agrees to sell B. all the mica

S. R. A. produced from his mines during a specified period and not to sell it to any other person, though the Court cannot compel A. to sell the mica to B. [s. 21, cl. (a)], it may restrain A. by an injunction from selling the mica to any other person (a). On the same principle if A. agrees to serve B. for a period exceeding three years, and not to serve any other person during that period, though B. cannot obtain specific performance of the contract [s. 21, cl. (g)], he may obtain an injunction restraining B. from serving elsewhere (b). But the Court is not bound to grant the injunction. The granting of an injunction under this section is discretionary. Thus where the defendant agreed to serve the plaintiff as a cutter for a period of ten years and not to serve as a cutter elsewhere during that period, the Court refused to restrain the defendant by an injunction from serving as a cutter elsewhere, it being proved that the circumstances under which the contract was entered into were such as to give the plaintiff an unfair advantage over the defendant within the meaning of branch I of s. 22 (c).

Ill. (c) is a reproduction of the decision in *Lumley v. Wagner* (d). But it does not follow therefore that the operation of the section is confined to cases like *Lumley v. Wagner*, that is, cases of contracts which are dependent on the personal qualifications or volition of the parties referred to in s. 21, cl. (b). This is borne out by the wide language of the section and by the other illustrations to the section (e).

Negative agreement may be implied.—The negative agreement need not be express as in *Lumley v. Wagner* (f): It may be implied as in Ills. (b) and (d). Ill. (d) shows that it may be implied even in the case of a contract of personal service, which, indeed, has the effect of enforcing indirectly a contract of personal service. Where the defendant agreed diligently and to the best of his ability to devote himself to the duties incumbent on him as a draftsman and general assistant to the plaintiffs for a period of five

(a) *Subba Naidu v. Haji Badsha Sahib* (1903) 26 Mad. 168. (d) (1852) 1 D. M. G. 604, 91 R. R. 193.

(b) *Madras Railway Co. v. Rust* (1891) 14 Mad. 18; *Burn & Co. v. McDonald* (1909) 36 Cal. 354. (e) *Subba Naidu v. Haji Badsha Sahib* (1903) 26 Mad. 168, 171-173.

(f) (1852) 1 D. M. G. 604, 91 R. R. 193.

(c) *Callianji v. Narsi* (1895) 19 Bom. 764, affirm. (1894) 18 Bom. 702.

years, it was held that though there was no negative condition in terms in the contract, a negative covenant could properly be implied under this section and ill. (d), and the defendant was restrained by an injunction from serving any other person during that period (g). See notes to s. 27 of the Contract Act under the head "Restraint during term of service," and l.n. (n) on p. 170. These provisions of the Act go beyond the English law as now understood. See above on pp. 972-973, and note following ill. (d) to this section.

S. R
S. C

Proviso to the section.—A plaintiff who has failed to perform his part of the contract is not entitled to the benefit of this section (h); see ill. (c).

Liquidation of damages not a bar to an injunction under this section.—It is provided by s. 20 that a contract may be specifically enforced, though a sum be named in it as the amount to be paid in case of its breach, and the party in default is willing to pay the same. The same principle applies to injunctions (i).

SCHEDULE.

ENACTMENT REPEALED.

Repealed by Act XI of 1891.

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|---|--|
| (g) <i>Burn & Co. v. McDonald</i> (1909) 36 Cal. 354. See also <i>Charlesworth v. MacDonald</i> (1898) 23 Bom. 103, a case from Zanzibar where the Specific Relief Act is not in force. | (h) <i>Subba Naidu v. Haji Badsha Sahib</i> (1903) 26 Mad. 168, 173. |
| | (i) <i>Malaya Railway Co. v. Rust</i> (1891) 14 Mad. 18, 22. |

THE INDIAN CONTRACT ACT

(ACT IX OF 1872).

WHEREAS it is expedient to define and amend certain parts of the law relating to contracts;
Preamble. It is hereby enacted as follows:

PRELIMINARY.

1.—This Act may be called the Indian Contract Act, S. 1.

Short title. 1872.

Extent. It extends to the whole of British India; and it shall come into force on the first day of September, 1872.

Commencement. *The enactments mentioned in the schedule hereto are repealed to the extent specified in the third column thereof*; but nothing herein contained shall effect the provisions of any Statute, Act or Regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract, (a) not inconsistent with the provisions of this Act.

Enactments repealed. *Repeal.*—The portion in italics has been repealed by the Repealing and Amending Act, 1914. The Schedule also has been repealed by the same Act.

Law anterior to Contract Act; Introduction of English Law into India.—The charters of the eighteenth century which established Courts of justice (b) for the three presidency towns of Calcutta, Madras,

(a) The words "not inconsistent with the provisions of this Act" are not to be connected with the clause "nor any usage or custom of trade". In the section as cited by the Judicial Committee there is no comma after "contract": *Irrawaddy Flotilla Co. v. Bugwandas* (1891) L. R. 18 Ind. Ap. 121, 127; 18 Cal. 620, 627. See further at p. 10, below.

(b) These were at first the Mayors'

Courts, which, in Calcutta, were superseded by the Supreme Court in 1773, and finally by the High Court in 1862. The Mayors' Courts in Madras and Bombay were replaced, in 1797, by the Recorders' Courts. The Recorder's Court in Madras was abolished in 1799, and that in Bombay in 1823, and a Supreme Court was established in its stead, which again was superseded by a High Court in both places in 1862.

8. 1. and Bombay, introduced into their jurisdictions the English common and statute law in force at the time (c) so far as it was applicable to Indian circumstances (d). It is, however, a matter of controversy whether English law was introduced by the charter of 1726 (13 Geo. I.) so as to extend to India the statutes passed up to that date only, or subsequently also by the charters of 1753 and 1774 so as to embrace statutes up to 1774 (e).

Introduction of native Law of Contract into India. - The indiscriminate application of English law to natives of India within the jurisdiction of the Supreme Courts led to many inconveniences (f). To

(c) Though this view of the introduction of English law into India was pronounced incorrect and unreasonable by the Indian Law Commissioners in their celebrated *lex loci* Report of 31st October, 1840, it may now be taken as an accepted doctrine. The Commissioners maintained that neither the Hindu nor the Mahomedan law was the *lex loci* of British India, as it was so interwoven with religion as to be unfitted for persons professing a different faith, and they held that, there being no *lex loci*, the English law became *ipso jure* the *lex loci* when any part of British India became a possession of the British Crown, and binding upon all persons who did not belong to the Hindu or Mahomedan community. They recommended the passing of an Act declaring a *lex loci* for British India founded on the English Law, but the recommendation was never carried into effect. See in this connection *Naraji v. Rogers* (1867) 4 B. H. C. 1, 17-25; *The Indian Chief* (1891) 3 Robinson Adm. pp. 28, 29, where Lord Stowell showed a much juster understanding than the Indian Law Commissioners of the nature of Asiatic personal law; and the cases cited in the next note.

(d) Thus it has been held that the

Statute of Mortmain, 9 Geo. II, c. 36, does not apply to India (*Mayor of Lyons v. East India Co.* (1836) 1 M. I. A. 175; 43 R. R. 27, 83); similarly the law as to forfeiture for suicide (*Adr-Gun. of Bengal v. Rance Sur-nungse Dassie* (1863) 9 M. I. A. 391) and the law as to maintenance and champerty (*Ram Coomur v. Chander Canto Mookerjee* (1876) L. R. 4 Ind. Ap. 23) do not apply to India, as not being applicable to Indian circumstances.

(e) This question has now only an historical interest, derived from the trial and conviction of Nanneomar under the English statute of 1728 (2 Geo. II, c. 25). According to the view that only the statutes up to 1726 were introduced into India, the conviction under the statute of 1728 would be illegal. It would, however, be legal according to the other view, and that view, was maintained by Sir James Stephen in his *Nanneomar and Impey*, vol. ii. See Hilbert on the Government of India, pp. 34, 35.

(f) Cowell's *Tagore Law Lectures*, 3rd ed. p. 55. Under the regulating Act of 1773, the Supreme Court of Calcutta practically exercised a general jurisdiction over the whole of Bengal.

obviate this, the statute of 1781 (21 Geo. III. c. 70, s. 17) empowered the Court at Calcutta (being then the Supreme Court), and the statute of 1797 (37 Geo. III. c. 142, s. 13) empowered the Courts of Madras and Bombay (being then the Recorders' Courts), to determine all actions and suits against the inhabitants of the said towns, provided that their succession and inheritance to lands, rents, and goods, and all matters of *contract* and dealing between party and party, should be determined in the case of Mahomedans by the laws and usages of Mahomedans, and in the case of Gentoos (Hindus) by the laws and usages of Gentoos, and where only one of the parties should be a Mahomedan or Gentoos by the laws and usages of the defendant (*g*). The effect of these statutes was to supersede English law so far as regards Hindus and Mahomedans in the case of contracts and other matters enumerated in the statutes, and to declare the right of Hindus and Mahomedans to their own laws and usages. The result was that in a suit on contract, for instance, between Hindus, the Hindu law of contract was applied, and the Mahomedan law in the case of a contract between Mahomedans, and this continued up to the enactment of the Indian Contract Act. S. 1.

Native Law of Contracts as administered by High Courts.—The statute of 1781 applied to the Supreme Court at Calcutta, and the statute of 1797 applied to the Recorders' Courts in Madras and Bombay. In 1862 High Courts were established for each of the presidency towns of Calcutta, Madras, and Bombay, but the same personal law continued to be administered to Hindus and Mahomedans, and is administered to them even at the present day subject to legislative enactments. Turning to matters of contract, the Hindu law of contract was in fact applied by the High Courts in the exercise of their original jurisdiction to Hindus, and the Mahomedan law to Mahomedans, up to the passing of the Contract Act in 1872, although the Courts to which the statutes of 1781 and 1797 were applicable had been abolished. The preservation of this jurisdiction appears to be accounted for by the charters of the High Courts. Taking the case of the Calcutta High Court, the combined effect of the Letters Patent of 1862 (cl. 18) and

(*g*) For similar Indian enactments, see note (*l*) at p. 6, *post*.

8. 1. of the amended Letters Patent of 1865 (cl. 19) (h) was to render it incumbent upon the High Court to apply in the exercise of its ordinary original civil jurisdiction the same *law or equity* that would have been applied by the Supreme Court. Now, the law or equity applied by the Supreme Court being under the statute of 1781 the Hindu law of contract to Hindus, and the Mahomedan law of contract to Mahomedans, the provision in that statute for applying the native law of contract to natives became incorporated by implication in the charters of 1862 as well as 1865, and in this manner that provision came to have effect in the High Court. This was, however, subject to the legislative powers of the Governor-General in Council as provided by the forty-fourth clause (i) of the charter of 1865. The Indian Legislature had, therefore, the power to alter by legislative enactment the provisions of cl. 19 of the charter, and this is done in the case of contracts by the Indian Contract Act. The result is that notwithstanding the provisions of cl. 19 of the charter of 1865, which directs the High Court to apply the same law or equity that would have been applied by the Supreme Court (*i.e.*, to apply, *inter alia*, the native law of contract to natives), the High Court has now to administer the law as laid down in the Indian Contract Act, whether the parties to the suit be Hindus, Mahomedans, or otherwise (j). In other words, the "law or equity" required to be administered by the High Court under cl. 19 of the amended Letters Patent is, in matters of contract, modified by the Indian Contract Act and other enactments relating to particular contracts. Subject, however, to any law made by the Governor-General in Council, the High Courts are still bound, in the exercise of their ordinary original civil jurisdiction, to apply the native law of contract to natives as comprised in the expression "law or equity" in cl. 19.

(h) "And we do further ordain that, with respect to the law or equity to be applied to each case coming before the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction, such law or equity shall be the law or equity which would have been applied by the said High Court to such case if these Letters Patent had not issued."

(i) "And we do further ordain and declare that all the provisions of these our Letters Patent are subject to the

legislative powers of the Governor-General in Council, exercised at the meetings for the purpose of making laws and regulations, and also of the Governor-General in cases of emergency under the provisions of an Act of the twenty-fourth and twenty-fifth years of our reign, chapter sixty-seven, and may be in all respects amended and altered thereby."

(j) See *Madhub Chunder v. Rajcoomar Doss* (1874) 14 B. L. R. 76.

As respects the High Courts in Madras and Bombay, the statute of 1797 contained a provision similar to that of the statute of 1781 for applying Hindn law to Hindus and Mahomedan law to Mahomedans. The statute of 1797, however, applied to the Recorders' Courts in Madras and Bomhay. Those Courts were superseded by a Supreme Court in Madras in 1799, and in Bombay in 1823. The charter of the Supreme Court of Madras and that of the Supreme Court of Bomhay contained similar provisions for the application of Hindu and Mahomedan law. The "law or equity" administered by the Supreme Courts in Madras and Bombay thus consisted in the application of Hindn law to Hindus and Mahomedan law to Mahomedans, and the same "law or equity" is directed to be applied by the High Courts in Madras and Bombay, by virtue of their charters (which closely resemble those of the Calcutta High Court), to cases coming before those Courts in the exercise of their ordinary original civil jurisdiction. S. 17 of the statute of 1781 and s. 13 of the statute of 1797 referred to above have been repealed by the Government of India Act, 1915. Sec. 112 of the latter Act reproduces the sections almost verbatim. S. 1.

Law administered in Mufassal Courts.—The old Bengal Regulation III of 1793 (s. 21) directed the Judges in the Zilla and City Courts in cases where no specific rule existed, to act according to justice, equity, and good conscience. Similar provisions occurred in the Madras Regulation II of 1802, s. 17. Both these regulations are now repealed, but the direction to act, in the absence of any specific rule, according to justice, equity, and good conscience, still retains its place in the Bengal Civil Courts (Act XII of 1887, s. 37) and in the Madras Civil Courts (Act III of 1873, s. 16).

As to the Courts in the Mufassal of Bomhay, the Bombay Regulation IV of 1827, s. 26, which is still in force, provides that the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, equity and good conscience.

The expression "justice, equity, and good conscience" has been interpreted to mean the rules of English law so far as they are applicable

- S. 1. to Indian society and circumstances (*k*). This expression also occurs in Indian Acts relating to Civil Courts in other parts of British India (*l*).

Applicability of the Act.—The second clause of s. 1 of the Act says in the most general terms that the Act is to extend to the whole of British India. These words are large enough to include all Courts and persons of all denominations. The third clause of s. 1 provides that nothing contained in the Act shall affect the provisions of any statute not thereby expressly repealed. The schedule of the Act enumerates the enactments repealed by the Act, but this enumeration does not include the provision in the statutes of 1781 and 1797 directing Hindu law to be applied to Hindus and Mahomedan law to Mahomedans. This circumstance gave rise, in *Madhub Chunder v. Rajcoomar Doss* (*m*), to a question as to the applicability of the Contract Act to Hindus in cases coming before the High Court in the exercise of its original civil jurisdiction. The parties to the suit were Hindus, and the case came before the High Court of Calcutta in the exercise of its original civil jurisdiction. On behalf of the plaintiff it was contended that the Contract Act did not apply, and that the case was governed, as provided by s. 17 of the statute of 1781, by the Hindu law of contract, which, it was alleged, did not render an agreement in restraint of trade void, as was done by s. 27 of the Act. It was, however, held that the Act did apply to Hindus, having regard to the general words used in cl. 2 of the section; as respects the non-repeal of the statute of 1781, it was said that it was not necessary to repeal

(*k*) *Waghela Rajsanji v. Sheikh Mas-ludin* (1887) L. R. 14 Ind. Ap. 89, 96; 11 Bom. 551, 561; *Dada v. Babaji* (1865) 2 B. H. C. 36, 38; *Webber v. Lealer* (1865) 2 B. H. C. 52, 56.

(*l*) Act XII of 1887, s. 37 (Bengal, North-Western Provinces, and Assam); Act IV of 1872, s. 5, as amended by Act XII of 1878 (Punjab); Act XX of 1875, ss. 5, 6 (Central Provinces); Act XVIII of 1876, s. 3 (Oudh); and Act XIII of 1898, s. 13 (Burma). Originally the words were synonymous with the rules of natural reason, or the law of nature; but "an Englishman would naturally interpret" them "as

meaning such rules of English law as he happened to know and considered applicable to the case": Ilbert, *Government of India*, 2nd ed. 330. Thus the Common Law has acquired in India a kind of moral predominance like that which Roman law obtained, under the name of "written reason", in various regions of Continental Europe where it was not recognised as having positive authority, especially in the customary law provinces of France under the old monarchy. *Cp.* Pollock, *The Expansion of the Common Law*, pp. 132—134.

(*m*) (1874) 14 B. L. R. 76.

it, as the Supreme Court to which it applied had been abolished, and there was nothing left to which it could apply. S.

Scope of the Act.—The Contract Act does not profess to be a complete code dealing with the law relating to contracts. As appears from the preamble, the Act purports to do no more than define and amend certain parts of that law. No doubt it treats of particular contracts in separate chapters, but there is nothing to show that the Legislature intended to deal exhaustively with any particular chapter or subdivision of the law relating to contracts (n).

In *Randas v. Amerchand & Co.* (o) the point for decision was whether a railway receipt was an “instrument of title” within the meaning of s. 103 of this Act. It was contended that it was not, for the following reasons: First, that the Indian Contract Act was primarily a consolidating Act, and therefore ought, in default of a clear expression to the contrary, to be read as embodying the law as existing when it was passed. Secondly, that it was improbable that the Indian Legislature could have taken the lead in a legal reform for which England had to wait until the passing of the English Factors Act of 1877. In dealing with these arguments, the Judicial Committee said: “Their Lordships cannot attach any weight to either consideration. The Indian Contract Act recites the expediency of defining and amending certain parts of the law relating to contracts. It is therefore an amending as well as a consolidating Act, and beyond the reasonable interpretation of its provisions there is no means of determining whether any particular section is intended to consolidate or amend the previously existing law. Again, Their Lordships do not see any improbability in the Indian Legislature having taken the lead in a legal reform. Such a reform may have been long recognized as desirable without an opportunity occurring for its embodiment in a legislative enactment, and it may well be that the opportunity occurred sooner in India than in this country, where the calls for legislative action are so much more numerous.”

(n) *Irrawaddy Flotilla Co. v. Bugwandas* (1891) L. R. 18 Ind. Ap. 121; 18 Cal. 620, 623, 629. “The Act, so far as it goes, is exhaustive and imperative”: *Mohori Bibee v. Dhurmodas*

Ghose (1903) L. R. 30 I. A. 114, 125; 30 Cal. 539, 548.

(o) (1916) 43 I. A. 164, 170, 40 Bom 630, 636.

1. 1. How far native law of Contracts is still in force.—As stated above, the Contract Act does not cover the whole field of contract law. In cases, therefore, not provided for by the Contract Act or other legislative enactments relating to particular contracts, it is incumbent upon the High Courts, in the exercise of their original jurisdiction, to apply the Hindu law of contract to Hindus and the Mahomedan law of contract to Mahomedans. This is because of the provisions of the charters of those Courts noted at pp. 3, 4, *ante*, which substantially continued the direction in this respect of the Acts of 1781 and 1797 (*p*). As an instance of the above proposition may be mentioned the rule of the Hindu law of contract known as *dāmdupat*, according to which interest exceeding the amount of the principal cannot be recovered at any one time (*q*). This rule is still in force in the Bombay Presidency (*r*) and in the presidency town of Calcutta (*s*), but it is not recognised outside that town (*t*) or in the Madras Presidency (*u*). There is, however, a difference of opinion as to whether the rule is abrogated by the Transfer of Property Act, 1882 (*v*), as regards interest on mortgages governed by that Act. It has been held by the High Court of Madras that it is (*w*): by the High Court of

(*p*) It will be seen from what is said above that the statement in Ilbert, Government of India, 2nd ed. p. 327, is not formally accurate so far as it implies that these provisions are still in force by virtue of the Acts themselves: yet in *Madhwa Sidhanta v. Venkataramanjulu* (1903) 26 Mad. 662, 670, the Act of 1797 was assumed to be still in force.

(*q*) See The Rule of *Dāmdupat*, by Framjee R. Vicajee, in *Journ. Soc. Comp. Legist.* for December, 1900, at p. 464.

(*r*) *Dhondu v. Narayan* (1863) 1 B. H. C. 47; *Khushalchand v. Ibrahim* (1866) 3 B. H. C. A. C. 23; *Nathubhai v. Mulchand* (1868) 5 B. H. C. A. C. 196; *Hakma Manji v. Meman Ayab* (1870) 7 Bom. H. C. O. C. 19; *Pavanaga v. Govind* (1873) 10 Bom. H. C. 382; *Ramchandra v. Bhimrav* (1877) 1

Bom. 577; *Ganpat v. Adarji* (1877) 3 Bom. 312; *Dawood v. Vullubhdas* (1893) 18 Bom. 227; *Gopal v. Gangaram* (1895) 20 Bom. 721, overruling *Shri Ganesh v. Keshavray* (1890) 15 Bom. 625; *Harilal v. Nagar* (1896) 21 Bom. 38; *Ali Saheb v. Shabji* (1895) 21 Bom. 85.

(*s*) *Nobin Chunder v. Romesh Chunder* (1887) 14 Cal. 781.

(*t*) *Het Narain v. Ram Deni* (1883) 12 C. L. R. 590.

(*u*) *Annaji Rou v. Ragubai* (1883) 6 Mad. H. C. 400.

(*v*) See ss. 86 and 88 of the Act. Both these sections have been repealed by the Code of Civil Procedure, 1908, and are reproduced in that Code in O. 34, rr. 2 and 4.

(*w*) *Madhwa Sidhanta v. Venkataramanjulu* (1903) 26 Mad. 662.

Bombay (z) and Calcutta (y), that it is not. Another instance is the rule applicable to Hindus governed by the Mitakshara law in the Bombay Presidency, that in the case of a debt wrongfully withheld after demand of payment has been made, interests become payable from the date of demand by way of damages. This rule, according to the Bombay High Court, is not affected either by the Interest Act, 1839, or by the Contract Act (z). The rule, however, is not applied to Hindus in the Madras Presidency (a). But such cases are very few, and the native law of contract may, for all practical purposes, be regarded as having been superseded by the Contract Act and other enactments relating to particular contracts. S. 1

Acts and Regulations not expressly repealed.—The laws made by the Legislatures for the presidencies of Bengal, Madras, and Bombay, before the date of the Government of India Act of 1833 (3 & 4 Will. IV. c. 85), were known as “Regulations.” The statute of 1833 established a legislature for the whole of British India, and the laws made under that statute, and the subsequent enactments modifying that statute, are known as “Acts.” As regards the Regulations, it may be stated that a major part of them has been repealed by subsequent Indian legislation. Among the Acts relating to particular contracts and not expressly repealed by the Contract Act may be mentioned the following: Act XXXII of 1839 as to interest, Act XXVIII of 1855 as to usury, Act IX of 1856 as to bills of lading, Act XIII of 1859 as to breaches of contracts by artificers, the Merchant Shipping Acts of 1854 and 1859, Act III of 1865 as to contracts with common carriers, and Act V of 1866 as to assignment of policies of insurance. The Acts enumerated above were passed before the enactment of the Contract Act. Among the Acts dealing with particular contracts and passed after that date may be noted the Negotiable Instruments Act XXVI of 1881, the Transfer of Property Act IV of 1882, Merchant Shipping Act V of 1883, Act XXI of 1883 as to contracts with emigrants, and Act IX of 1890 as to contracts with railways.

Saving of usage or custom of trade, etc.—The term “usage of trade” is to be understood as referring to a particular usage to be

(z) *Jeevanbai v. Manordas* (1910) 35 Bom. 199.

(y) *Kunja Lal v. Narsamba* (1915) 42 Cal. 826.

(z) *Saunadanappa v. Shivbasawa* (1907) 31 Bom. 354.

(a) *Subramania Aiyar v. Subramania Aiyar* (1908) 18 Mad. L. J. 245.

8. 1. established by evidence, and perfectly distinct from that general custom of merchants which is part of the law of the realm and is to be collected from decisions, legal principles, and analogies, and, according to the better opinion, can still be increased by proof of living general (not merely local) usage (b). Such a usage remains unaffected by the provisions of the Act, even though it may be inconsistent with those provisions. Both the reason of the thing and the grammatical construction of the section (c) require that the words "not inconsistent with the provisions of this Act" should not be connected with the clause "nor any usage or custom of trade," and apply only to the immediately preceding words "nor any incident of any contract." This view was taken by the Judicial Committee in *Irrawaddy Flotilla Co. v. Bagrandas* (d). The contrary seems to have been assumed by the Bombay and Calcutta High Courts in two earlier cases (e). Both these cases were considered by the Judicial Committee in the above case. In both these cases, again, the opinion was expressed by the Bombay and Calcutta High Courts that the liability of a common carrier under the common law of England, which renders him liable for all loss or damage to goods except when caused by the act of God or the King's enemies, was a "usage of trade," the one Court holding that it was inconsistent, and the other that it was consistent, with the provisions of the Contract Act. In the Privy Council case cited above, the Judicial Committee were inclined to the opinion that the liability of a common carrier under the English common law as an insurer of goods was not a usage of trade, but that it was an "incident" of the contract quite consistent with the provisions of the Act. Such an incident is not inconsistent with the provisions of ss. 151 and 152 of the Act, having regard to the words "in the absence of any special contract" occurring in s. 152. All these cases are considered more fully

(b) See 1 Smith's Leading Cases, 483; *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658; *Edelstein v. Schuler & Co.* [1902] 2 K. B. 144; Sir F. B. Palmer in L. Q. R. xv. 245.

(c) In the section as cited by the Judicial Committee, there is no comma after "contract": see L. R. 18 Ind.

Ap. at p. 127.

(d) (1891) L. R. 18 Ind. Ap. 121, 127 - 18 Cal. 620, 627.

(e) *Kuverji v. The Great Indian Peninsula Railway Co.* (1878) 3 Bom. 109, 113; *Moothora Kant Shaw v. The India General Steam Navigation Co.* (1883) 10 Cal. 166, 185.

in the notes to s. 151. See also as to "usage of trade" in the case of High Court attorneys s. 171 and *In re McCorkindale* (f) there cited. S. :

Evidence as to usage of trade.—In this connection may be noted the provisions of s. 92 (5) of the Indian Evidence Act, 1872, which enacts that, though a contract may be in writing, oral evidence may be adduced to prove any usage or custom by which incidents not expressly mentioned in the contract are usually annexed to contracts of that description, provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract (g). And further such incident should not be inconsistent with the general provisions of the Contract Act, having regard to the words "nor any incident of any contract not inconsistent with the provisions of this Act." This is a reproduction of the English law on the subject (h). As to the evidence necessary to prove a usage of trade, it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient imported by the parties into their contract. To prove such a usage, there needs not either the antiquity, the uniformity, or the notoriety of custom in its technical sense; the usage may still be in course of growth, and may require evidence for its support in each case (i). See also Evidence Act, s. 13 (b).

Sections referring to usage or custom of trade.—S. 110 provides that an implied warranty of goodness of quality may be established by the "custom of any particular trade." S. 190 enacts that an agent cannot delegate his authority to another unless allowed by the "ordinary custom of trade." Similarly an agent is bound, in the absence of directions from the principal, to conduct business according to "the custom which prevails in doing business" of the same kind at the place where the agent conducts such business" (s. 211). It may here be observed that the expression "usage or custom of trade" used in

(f) (1881) 6 Cal. 1.

(g) See *Ruttonji Rouji v. Bombay United Spinning and Weaving Co.* (1917) 41 Bom. 518, at pp. 538, 540.

(h) *Per Cur.* in *Brown v. Byrne* (1855) 3 E. & B. 715; 23 L. J. Q. B. 316; and in *Hamprey v. Dale* (1857) 7 E. & B. 274; 26 L. J. Q. B. 137, 140.

(i) *Juggomohun Ghose v. Manickchand* (1859) 4 W. R. 8, 10; 7 M. L. A. 263, 282; *Wittenbaker v. Galstaun* (1917) 44 Cal. 917, at p. 925.

The allowance of new usage involves the possibility of allowing change in previous usage; *Moult v. Halliday* [1898] 1 Q. B. 125, 130.

8. 1. s. 1, as well as the sections referred to above, relates to a particular usage as distinguished from a general or universal usage. A general usage pervading all trades has no binding force, if it is inconsistent with the provisions of the Act. A general usage is equivalent to a general law, and no general law or usage in contravention of the general law laid down by the Contract Act can be consistent with the validity of the Act itself (j).

Choice of law governing contract.—It may be doubtful what law is to be applied to decide on the validity or the interpretation of a contract, or both, as where the contract is made in one jurisdiction and to be performed in another, or is sued on in a jurisdiction where it was not made or to be performed. The Act does not deal with questions of this kind.

In ordinary circumstances the proper law of a contract (to use Mr. Dicey's convenient expression) will be the law of the country where it is made (k). But where a contract is made in one country and to be performed wholly or in part in another, the proper law may be presumed to be the law of the country where it is to be performed. (l)

But these rules are only in the nature of presumptions, and subject to the intention of the parties, whether expressly declared or inferred from the terms and nature of the contract and the circumstances of the case (m). The subject cannot be discussed at large here; the above rules, however, are settled and will commonly be found sufficient.

Generally the capacity to contract follows the law of domicile at the time of making the contract (n); but capacity to contract with

(j) *Moothora Kant Shaw v. The India General Steam Navigation Co.* (1883) 10 Cal. 166, 185. See also *Meyer v. Dresser* (1863-4) 16 C. B. N. S. 646; 33 L. J. C. P. 289, where Erle, C.J., said: "It is a contradiction to say the law does not give the right, and yet that there is a universally established usage to allow it. A universal usage cannot be set up against the general law."

(k) Dicey, *Conflict of Laws*, 2nd ed., Rule 152, sub-r. 3; *Lloyd v. Guibert* (1865) L. R. 1 Q. B. 115, 122 (in Ex. Ch., a classical judgment of a very

strong Court delivered by Willes, J.).

(l) *Ibid.*; *Cox v. The Governors of Bishop Cotton's School* (1874) Punj. Rec. No. 85.

(m) Dicey, Rule 152, sub-rr. 1 and 2; *Hamlyn v. Talisker Distillery* (1894) A. C. 202 is now the leading English authority. And see *Abdul Aziz v. Appayasami* (1903) 27 Mad. 131; 31 I. A. 1 (parties bound according to the law as they understood and adopted it at the time, though their interpretation proved erroneous).

(n) *Lachmi Narain v. Fatah Bahadur* (1902) 25 All. 195; Dicey, Rule 149.

- regard to immovable property is determined by the local law of its situation (o). This of course is a matter of law which the parties cannot alter. A large proportion of the decisions under this head have been in matrimonial causes; but the special complications arising in questions of marriage and divorce are outside the scope of the present Act and of the ordinary law of contract (p).

Act not retrospective.—The provisions of this Act do not apply to contracts made before the Act came into force (q).

The Transfer of Property Act IV of 1882, s. 4, provides that the chapters and sections of that Act which relate to contracts shall be taken as part of the Contract Act.

2.—In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :

Interpretation
clause.

- (a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal :
- (b) When the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted. A proposal, when accepted, becomes a promise :
- (c) The person making the proposal is called the “ promisor,” and the person accepting the proposal is called the “ promisee ” :
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises

(o) *Bank of Africa v. Cohen* [1909] 2 Ch. 129, C. A.

(p) See *Ogden v. Ogden* [1906] P. 46 C. A.

(q) *Omda Khanum v. Brojendra* (1874) 12 B. L. R. 451, 458; *ib.* p. 472 (on appeal), where A. sued B. upon a contract executed by B. in 1869 pro-

viding for payment of interest on the amount of a loan at the rate of 75 per cent. per annum. On behalf of B. it was contended that the case was governed by the Contract Act, ss. 73, 74 and 75, but the Court intimated their opinion that the Act had no retrospective effect.

- S. 2.** to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise :
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement :
 - (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises :
 - (g) An agreement not enforceable by law is said to be void :
 - (h) An agreement enforceable by law is a contract :
 - (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract :
 - (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

Summary of the Section.—This section is understood to be the work of Sir James Stephen. There is nothing like it in the original draft prepared by the Indian Law Commissioners at home, which only laid down in general terms that “a contract is an agreement between parties whereby a party engages to do a thing or engages not to do a thing” (r). As the section stands, its position and form are open to the remark that it professes to be an interpretation clause, but really declares a considerable part of the substantive law. Moreover, the propositions it lays down are by no means confined to principles of universal jurisprudence, but embody several conceptions which are peculiar to the Common Law, or of peculiar importance in it. We learn from cls. (a), (b), (c), (e), and (f) that an agreement is a promise or a set of reciprocal promises ; that a promise is formed by the acceptance of a proposal ; and that there must be a promisor who makes the proposal and a promisee who accepts it. In the case of reciprocal promises each party is a promisor as to the promise he makes and a promisee as to that which he receives; he is both proposer and acceptor, proposing

(r) S. 1 of draft Second Report of Indian Law Commissioners, 1866, at p 11.

to become liable and accepting the other's liability. The mutual proposals of the two parties become promises by mutual acceptance; whatever may have happened before the promises are exchanged is merely preliminary negotiation, and does not enter into the legal analysis of the transaction. S. 2.

Proposal and promise.—The word “proposal” is synonymous in English use with “offer.” But the language of these definitions appears to confine “proposal” to an offer to be bound by a promise. Thus a man who offers to sell and deliver, then and there, existing portable goods in his immediate control, such as a book or a jewel, does not offer a promise but an act, and if the other party takes the goods on the spot and becomes liable to pay for them, he (the buyer) is the only promisor (s). In such a case the seller would seem not to make a proposal within the terms of the Contract Act. But in England no one would hesitate to say that he offers (or proposes, though this word is less usual) to sell his goods.

The Act does not say, but it seems to imply, that every promise is an accepted proposal. In the Common Law this is not so, for a binding promise may be made by deed, that is, by writing under seal, without any communication between the parties at all. This is because the deed, as an ancient formal method of proof, was conclusive against its maker. It was introduced at a time when, under the archaic procedure still in force in the eleventh and twelfth centuries, all proof had to be conclusive or nothing. The party's solemn admission that he was bound originally excluded all defence. It still dispenses, in England, with positive proof of any ulterior ground of liability (t). But the practice of executing deeds in the English form and the legal doctrines exclusively applicable to such instruments have never been introduced in India. We have, therefore, no occasion to dwell on them here. There is nothing analogous to them in the provision of our Act (s. 25, sub-s. 1, p. 188, below) for sanctioning certain voluntary agreements by registration. It is also difficult at first sight to say, without doing some violence to language, that in the common affairs of life a promise

(s) We assume for simplicity's sake that there is no question of warranty, as in fact there often is none.

(t) This is subject to the important qualification that specific performance

of a merely voluntary covenant will not be granted. In most American jurisdictions the peculiar law concerning the form and effect of deeds has been altered by legislation.

8. 2. is always an accepted proposal. Take the case of a man offering to sell and deliver goods on credit, then and there, to another who at first does not want the goods, but is finally persuaded to take them at a price named by the seller. Here the seller delivers the goods and receives in exchange the buyer's promise to pay for them. Now the buyer's promise has never been a proposal; the seller offered to sell, and the buyer accepted the offer by taking the goods and pledging his credit. It may be said, however, that the buyer must be deemed to adopt the seller's terms at the last moment before delivery of the goods. For the seller will not deliver them unless he knows that he will get the buyer's promise to pay for them; and the only way in which he can be sure of this is the existence of a proposal from the buyer to become liable for the price, which proposal will become a promise on the goods being delivered. Further, it may be said that this is the only way in which the promise can really be simultaneous with the performance for which it is exchanged, as the theory of the Common Law requires it to be. Both these reasons (though the force of the latter appears to be destroyed in British India by sub-s. (d), as we shall see) appear to be sound, and sufficient on principle to justify the language of the Act. The case of mutual promises will be considered when we come to it under sub-s. (d).

Promise and Consideration.—Again, the technical use of the word “promise” in the Act is far narrower than the popular use. Express words of promise may be and often are in law no more than a proposal (u). In common life many promises are made, and regarded as morally binding between one person and another, without any “view to obtaining the assent of that other” to the contents of the promise. In common speech no one thinks of acceptance by the promisee as being an essential condition which must be satisfied before a declaration of intention amounts to a promise. It may be asked, then, why the word “promise” should not have retained its literal and proper meaning, and further why all deliberate promises should not be binding, subject to necessary exceptions and regulations.

(u) Thus a letter requesting a loan of money, and promising repayment with interest on a certain day, is not a promissory note, but a mere proposal for a loan: *Dhondbhat v. Atmaram* (1889) 13 Bom. 669; *Narayanasaami v. Lokanibalammal* (1897) 7 Mad. L. J. 220.

For example, a promisor could not be held to remain bound if the promisee refused to accept; and some rules of evidence would be required by way of caution, so that men should not be burdened by legal obligations in consequence of hasty or trifling words which the other party had no moral right to take seriously. The answer is that this way thus suggested has indeed been taken by other systems of law, and especially the modern Roman law, which has been adopted on the continent of Europe and in the kingdom of Scotland, but the common law has taken a distinct road of its own. Apart from the peculiar case of a promise made by deed, English law will not enforce a promise unless it was given for value, that is, not necessarily for an adequate value, but for something which the law can deem of some value, and the parties treat as such by making it a subject of bargain. The value so received in exchange for the promise may consist in present performance, for example the delivery of goods, or it may itself be the promise of a performance to come. These elements are embodied in the definition of consideration by cl. (d) of our section. This clause is especially open to the remark that what purports to be interpretation of terms is really substantive enactment. Only in s. 25, however, with partial anticipations in ss. 10, 23, and 24, does it appear for what purpose the notion and definition of consideration have been introduced.

Definition of Consideration.—The terms of the Indian definition must now be examined. They do not appear to follow those of any authoritative English exposition; they expand, with only verbal difference, those of one of the explanations in the Commissioners' original draft (v). Whether it was so intended by the framers or not, some of the terms are capable, in their literal meaning, of restoring a doctrine which was long ago finally disallowed in England, and, moreover, they have been held to have that effect. We take the material phrases in order.

"At the desire of the promisor."—The act constituting the consideration must have been done at the desire or request of the *pro-*

(v) S. 10, expl. 3: "A good consideration must be something which at the desire of the person entering into the engagement another person [*N.B.*] has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing." None of the illustrations show any intention to alter the modern common law.

2. *misor*. An act done at the desire of a third party is not a consideration. Thus a promise by the defendants to pay to the plaintiff a commission on articles sold through their agency in a market constructed by the plaintiff, not at the desire of the defendants, but of the collector of the place, is void under s. 25, being without consideration (*w*). Nor can it be supported under cl. 2 of that section, which enacts that an agreement without consideration is void, unless it is a promise to compensate a person who has already voluntarily done something for the promisor. The expression "voluntarily" appears to be used in contradistinction to the words "at the desire of the promisor" (*x*). In this case, even if the market were not established by the plaintiff at the desire of the defendants, the agreement would be binding, provided it was done by the plaintiff voluntarily for the defendants. The Court, however, found that the market was not constructed by the plaintiff for the defendants so as to bring the case within the provisions of s. 25, cl. 2.

Questions may sometimes arise whether the thing done by the plaintiff claiming under a promise was in fact done *at the desire of the promisor*. The Commissioners of the Howrah Municipality created themselves by deed trustees for the purpose of building a town hall in Howrah and inviting and collecting subscriptions for that purpose. The defendant was a subscriber to this fund of Rs. 100, having signed his name in the subscription book for that amount. As soon as the subscriptions allowed, the Commissioners, including the plaintiff, who was also vice-chairman of the municipality, entered into a contract with a contractor for the purpose of building the town hall. The defendant not having paid his subscription, a suit was brought against him by the plaintiff on behalf of himself and all the other Commissioners who had rendered themselves liable to the contractor. It was held that the suit would lie, as there was a contract for good consideration. It was stated in the course of the judgment that the subscriber knew the purpose to which the subscriptions were to be applied, and also knew that on the faith of their subscription an obligation was to be incurred to pay the

(*w*) *Durga Prasad v. Baldev* (1880) 3 All. 221.

(*x*) *Sindha Shri Ganpatisingji v. Abraham* (1895) 20 Bom. 755, 758.

contractor for the work (y). In fact, the act of the plaintiff (promisee) S. 2 in entering into the contract with the contractor may be said in this case to have been done at the desire of the defendant (promisor), so as to constitute a consideration within the meaning of the section for the promise to pay the subscription. If there were no contract with the contractor, or if no liability had been incurred and nothing substantial had been done on the faith of the defendant's promise, the promise to pay the subscription would have been without consideration, and therefore void. No similar decision is known to have been given in England, and it seems doubtful whether there was really a sufficient request by the defendant to the plaintiff and those whom he represented. It would seem to follow that in the opinion of the Calcutta High Court every promise of a subscription to a public or charitable object becomes a legal promise, and enforceable by the promoters, as soon as any definite steps have been taken by them in furtherance of the object and on the faith of the promised subscriptions. Such is certainly not the general understanding of the profession in England (z). In a recent Allahabad case where a Mahomedan subscribed Rs. 500 to a fund started to rebuild a mosque, and no steps were taken to rebuild the mosque, it was held that the promise was without consideration, and that the subscriber was not liable (a).

"Or any other person."—In modern English law it is well settled that consideration must move from the promisee (b). Under the Act, however, consideration may proceed from the promisee or any other

(y) *Kedar Nath v. Gorie Mahomed* (1886) 14 Cal. 64. The statement of the facts in the body of the report is (as is too commonly the case in Indian reports) inadequate.

(z) There is some American authority (seemingly not in any of the Courts whose decisions carry most weight outside their own jurisdiction) in favour of this view: Harriman on Contracts, 2nd ed. (1904), s. 129.

(a) *Abdul Aziz v. Masum Ali* (1914) 30 All. 268. *Cp. Re Hudson* (1885) 33 W. R. 819 (claim in administration suit for unpaid instalments of testator's promised subscription, with allegation of

expense and liabilities incurred on the faith thereof, treated as unarguable).

(b) "The meaning of this rule seems to be that the matter of the consideration must be given, done, or suffered by the promisee himself, or, if by a third party, at the request and by the procurement of the promisee, and as the agreed equivalent for the promise; and, with this meaning, the rule seems to import no more than is necessarily implied in the conception of a consideration as an essential part of the agreement": Leake, *Law of Contracts*, 6th ed. (1911) pp. 439, 440.

2. *person*. The result, according to the decisions now to be cited, is to restore the doctrine of some earlier English decisions which are no longer of authority in England. In *Dutton v. Poole* (c), decided so far back as 1688, where the father of a bride was about to fell timber on his estate to provide a marriage portion for her, and refrained from doing so on the eldest son promising to pay the amount to her, it was held that the daughter could maintain an action against the son on the promise to the father. It will be observed that no consideration proceeded from the daughter. She was not a party to the contract, and the whole consideration moved from the father. On the faith of the son's promise, the father abstained from felling the timber, and as a result the estate with the timber descended to the son as the heir-at-law. The ground of the decision was that, having regard to the near relationship between the plaintiff (daughter) and the party from whom the consideration moved (father), the plaintiff might be considered a party to the consideration. That is to say, a stranger to the consideration could, by construction of law, be regarded as a party to it, if he was closely related to the person from whom the consideration actually proceeded. But this decision is no longer law in England, and was finally set aside by *Tweddle v. Atkinson* (d). In that case, decided in 1861, an agreement was entered into between the respective fathers of a husband and wife that each should pay a sum of money to the husband, and that the husband should have full power to sue for such sums. After the death of both the contracting parties the husband sued the executors of the wife's father upon the above agreement, but the action was held not to be maintainable. The husband was a stranger to the consideration, and the plea of nearness of relationship to the contracting parties was regarded as of no consequence. As to *Dutton v. Poole*, it was said that there was no modern case supporting that decision, and its authority was treated as overruled. It may now be taken as an established rule of English law that a third party cannot sue on a contract though made for his benefit, and the nearness of relationship cannot be invoked to import what may be called constructive consideration. However, *Dutton v. Poole* was relied on, and *Tweddle v. Atkinson* distinguished, by Innes, J., in *Chinnaya v. Ramayya* (e)

(c) 2 Lev. 210.

(d) 1 B. & S. 393, 124 R. R. 610. See

especially the judgment of Crompton, J.

(e) (1881) 4 Mad. 137.

in the High Court of Madras. In that case, A., by a deed of gift, made over certain property to her daughter, with a direction that the daughter should pay an annuity to A.'s brother, as had been done by A. On the same day the daughter executed a writing in favour of the brother agreeing to pay the annuity. The daughter declined to fulfil her promise, and the brother sued the daughter to recover the amount due under the agreement. On behalf of the daughter it was contended that no consideration proceeded from the brother, and that he, being a stranger to the consideration, had no right to sue. Innes, J., held, following *Dutton v. Poole* (f), that the consideration indirectly moved from the brother to the daughter, and that he was, therefore, entitled to maintain the suit. *Tweddle v. Atkinson* was distinguished upon the ground that there no consideration proceeded either directly or indirectly from the husband, as he was not worse off from the non-fulfilment of the promises than he would have been if they had not been made. It does not appear probable that this ingenious attempt to save the authority of *Dutton v. Poole* would be supported in an English Court. In the Madras case now referred to, Kindersley, J., preferred, in fact, to rest his judgment upon the terms in which this section defines "consideration." In a later Madras case (g), the administratrix of the estate of a deceased person agreed to pay one of the heirs of the deceased his full share of the estate if the heir gave a promissory note for a proportionate part of a barred debt due to a creditor of the estate. The heir executed a promissory note in favour of the creditor, gave it to the administratrix, and received his full share in the estate. The note was subsequently handed over by the administratrix to the creditor. In a suit by the creditor against the heir on the note, it was held that the act of the administratrix in handing over to the heir his share of the estate without deducting any portion of the debt constituted consideration for the heir's promise to the creditor, and that the creditor could recover upon the note.

It will be observed that in both the Madras cases the consideration proceeded from a *third party* and that in both the cases the suit must have been dismissed if it had to be decided according to the modern English law.

(f) (1888) 2 Lev. 210.

6 Mad. 351.

(g) *Samuel v. Ananthanatha* (1883)

8. 2. But though under the Act *consideration* for an agreement may proceed from a *third party*, a person not a party to the agreement cannot sue on the agreement (*h*), and this is clearly indicated by the provisions of sub-ss. (a), (b), (c), and (i) of the present section. Thus if A. enters into a contract with B., and the contract is made for the benefit of C. as it was in *Dutton v. Poole*, this cannot confer a right of action on C. In this connection, it is important to observe that in both the Madras cases cited above the agreement sued upon was *between the plaintiff and the defendant*, though the consideration in either case proceeded from a third party. This view has been recently emphasized by the High Court of Madras and other High Courts. It has accordingly been held that where A. mortgages his property to B., part of the consideration for the mortgage being B.'s promise to A. to pay C. the amount which A. owed to C., C., not being a party to the contract, cannot sue B. for the payment. (i) Similarly, it has been held that where a policy of insurance is effected by the assured on his own life, and the policy is expressed to be for the benefit of his wife, the wife, not being a party to the contract of assurance, is not entitled, in cases not governed by the provisions of the Married Women's Property Act, 1874, to sue the Insurance Company on the policy unless the policy is assigned in writing as provided by Transfer of Property Act, 1882, s. 130, or a trust has been declared by the assured as provided by the Indian Trusts Act, 1882, s. 5 (j). Upon the same principle where a lease contained a stipulation that the lessee would pay to the Zamindar zamindari dues which were payable by the lessor to the Zamindar, it was held that the *Zamindar*, not being a party to the lease, was not entitled to sue the lessee under the terms of the lease (*k*).

(h) *Shankar v. Umabai* (1913) 37 Bom. 471, at p. 479; *Mannath v. Thazheth* (1918) 34 Mad. L. J. 193, 196, 200. See also *Jamna Das v. Ram Autar* (1912) L. R. 39 I. A. 7, 34 All. 63.

(i) *Iswaram Pillai v. Sonnivevaru* (1913) 38 Mad. 753; *Kasturamma v. Venkatasurayya* (1915) 29 Mad. L. J. 538.

(j) *Shankar v. Umabai* (1913) 37 Bom. 471. The parties to the suit in this case were Hindus and it was held that the provisions of s. 6 of the Married Women's Property Act did not apply to them: *contra Balamba v. Krishnaya* (1913) 37 Mad. 483 [F. B.].

(k) *Mangal Sen v. Muhammad Hussain* (1915) 37 All. 115.

But where a contract between A. and B. is intended to secure a benefit to C. as a *cestui que trust*, C. may sue in his own right to enforce the trust. And this seems to be the principle underlying the decision of the Judicial Committee in *Khawaja Muhammad Khan v. Husaini Begam* (l). In that case C. sued her father-in-law, A., to recover arrears of certain allowances called *kharch-i-pandan*, payable by A. to C. under an agreement made between A. and C.'s father prior to and in consideration of C.'s marriage with A.'s son, D. Both C. and D. were minors at the date of the marriage. The agreement created a distinct charge in favour of C. on certain immovable property belonging to A. for the payment of the allowance. It was contended on behalf of A., on the authority of *Tweddle v. Atkinson* (m), that C. could not sue upon the contract, as she was no party to the agreement. But this contention was overruled, and the suit was decreed. As to *Tweddle v. Atkinson*, their Lordships said that it was a case of an action of assumpsit, and that the rule of common law on the basis of which it was dismissed was not applicable to the facts and circumstances of the case before them, as the agreement executed by A. specifically charged immovable property for the allowance which A. bound himself to pay to the plaintiff, and the plaintiff was the only person beneficially entitled under it. Their Lordships added that in India and among communities circumstanced as the Mahomedans, among whom marriages are contracted for minors by parents and guardians, it might occasion serious injustice if the common law doctrine was applied to agreements or assignments entered into in connection with such contracts (n).

The principle of the Privy Council decision was followed by the High Court of Calcutta in a case in which the facts were somewhat peculiar (o). In that case A. advanced Rs. 300 to B. on the security of a *pattah* relating to immovable property and deposited with him by B. B. then transferred by a registered *kabala* all his property, movable and immovable, to C. for a sum of Rs. 2,000. This Rs. 2,000 was not all paid in cash, but there was

(l) (1910) 32 All. 410; L. R. 37 Ind. Ap. 152, in appeal from (1906) 29 All. 151. 90 R. R. 314, is an English case really of the same class.

(m) 1 B. & S. 393, 124, R. R. 610, cited on p. 20 above.

(n) *Page v. Cox* (1852) 10 Ha. 163;

(o) *Debnarayan Dutt v. Chunilal Ghose* (1914) 41 Cal. 137.

8. 2. a provision and declaration in the *kabala* that out of this consideration money of Rs. 2,000, the sum of Rs. 300 due to A. should be paid by C. A. sued C. for Rs. 300, basing his claim upon the *kabala*. It was found that there was *no agreement* between A. and C. for payment of Rs. 300 by C. to A. (p) but that on the very day on which the *kabala* was executed C. acknowledged the obligation to pay Rs. 300 to A., that the acknowledgment was communicated to and accepted by A., and that as a result of this the *pattah*, which was erroneously believed by the parties as constituting a charge (q), was handed over by A. to C. Upon these facts it was held that A. was entitled to recover the amount claimed from C. This decision was followed by the same High Court in a later case when there was no communication to A. of the arrangement between B. and C., the Court holding that the absence of communication did not make any difference in principle (r).

The same principle has been applied by the Courts of India to cases where a provision is made for the maintenance of female members of a Hindu family on a partition of the joint family property between the male members. Thus where A. and B., two Hindu brothers, divided the family property between them, and agreed at the time of partition that they should contribute Rs. 300 in equal shares, and invest the sum on the security of immovable property and pay the interest towards the maintenance of their mother, it was held that the mother, though she was not a party to the contract, was entitled to sue her sons to have that amount invested in her favour (s). Similarly, where on a partition between a Hindu son and his father it was arranged that the father should remain in possession and management of the share of the property allotted to the son and maintain the son's wife and his children out of it, it was held that the wife, though not a party to the arrangement, was entitled to sue the father for the maintenance of herself and her children (t). The wife and

(p) It was argued in this case that there was a novation within the meaning of s. 62 below, but it was held upon the facts that there was no novation.

(q) The case was from the Mufussal, where a mortgage by deposit of title deeds is not recognized by law. see Transfer of Property Act, 1882, s. 59.

(r) *Dwarika Nath v. Priya Nath* (1917)

22 Cal. W. N. 279; see *Debnarayan Dutt v. Chunital Ghose* (1914) 41 Cal. 137, at p. 141.

(s) *Shuppu Ammal v. Subramaniam* (1909) 33 Mad. 238; *Arumuga Gounden v. Chinnammal* (1911) 21 Mad. L. J. 918.

(t) *Rakhabai v. Govind* (1904) 6 Bom. L. R. 421.

children, though not named as parties to the contract, possessed an actual beneficial right which placed them in the position of *cestuis que trust* under the contract (u). "Though the plaintiffs are not named parties to the contract, yet they are not in that sense strangers to the consideration of the contract so as to prevent them from suing on it in their own name as to such part as is for their benefit and on their behalf" (v). Similarly where a provision is made for the marriage expenses of a female member of a Hindu family on a partition of the joint family property between the male members, the female member is entitled to sue the parties to the partition deed to enforce the provision in her favour (w).

S. 2.

Past consideration.—In the same clause the words "has done or abstained from doing" call for special attention. They declare the law to be that an act done by A. at B.'s request, without any contemporaneous promise from B., may be a consideration for a subsequent promise from B. to A. Now, the general principle of the common law is that in the formation of a contract the consideration is given and accepted in exchange for the promise. Hence the acceptance of the consideration and the giving of the promise must be simultaneous, and, in order to have the effect of binding the party making it, a request must be the offer of a promise in return for some consideration, which offer will become a promise (if not meanwhile revoked) (x) if and when the consideration is furnished as requested. Thus the consideration must always be present at the time of making the promise, and there is no such thing as a past consideration. If a service is rendered without any immediate promise or understanding that it is to be recompensed, it is a merely gratuitous act having no legal effect except such transfer of property or the like as may be contained in the act itself. If there be such a promise, express by words or tacit by understanding to be inferred from the circumstances, there is at once an agreement,

(u) *Gandy v. Gandy* (1885) 30 Ch. D. 37 (a negative decision). We are not aware that in England the doctrine has ever been extended beyond marriage settlements.

(v) Per Green, J., in *Blackwell & Co.*

v. Jones & Co. (1870) 7 Bom. H. C. O. C. 144, at p. 148.

(w) *Sundararaja v. Lakshmiammal* (1914) 36 Mad. 788.

(x) As to revocation, see p. 41 below.

8. 2. in which, if the recompense be not specified, the promise is to give such reward as may be found reasonable. A subsequent promise specifying the reward will not make an obligation where there was none before, but will show what the parties thought reasonable; and there is generally no reason why the parties' own estimate, in a matter which concerns only themselves, should not be accepted. Such a promise "may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration on the faith of which the service was originally rendered" (y). In many common circumstances the fact of service being rendered on request is ample evidence of an understanding that it was to be paid for according to the usual course.

The use of the perfect tense in the clause now under consideration embodies in the law of British India the exception to the general rule which is supposed to have been made by the seventeenth-century case of *Lampleigh v. Brathwait* (A.D. 1615) (z). There it was allowed that in general a service rendered without any agreement for reward at the time will not support a subsequent promise of reward—"a mere voluntary courtesy will not have (a) a consideration to uphold an Assumpsit"—but it was said that if the service was "moved by a suit or request" of the promisor, the promise "couples itself with the suit before," or, as we should now say, is held to relate back to the original request, and accordingly is deemed to be made on good consideration.

It would seem that this fiction was really needless, and that the true account of such cases was given by Lord Bowen (following an earlier dictum of Erle, C.J.) in the passage above cited. Our act has adopted the doctrine of *Lampleigh v. Brathwait* in its current form. We shall come to another exception from the general principle in s. 25, sub-s. (2), below. The manner in which the law of Consideration is split up between s. 2 and ss. 10, 23, 24, and 25 does not conduce to certainty in interpreting the intention of the Act as a whole on the subject.

(y) Bowen, L. J., *Re Casey's Patents* [1892] 1 Ch. 104, 115. defendant's name is often miswritten in various ways in modern books.

(z) Hob. 105; 1 Sm. L. C. 141. The (a) *Sic.* One would expect "make."

Indian Courts have here followed, as they were bound to do, S. 2. the terms of the Act. In *Sindha v. Abraham (b)*, the plaintiff rendered services to the defendant at his desire expressed during his minority, and continued those services at the same request after his majority. The question arose whether such services constituted a good consideration for a *subsequent* express promise by the defendant to pay an annuity to the plaintiff. The agreement was one to compensate for past services, and it was held that it could be enforced, as the services formed a good consideration within the meaning of this section. The Court was of opinion that the services were intended to be recompensed, though the nature and the extent of the proposed recompense were not fixed until the agreement sued upon was executed by the defendant. If so, there was a contract for reasonable recompense when the services were rendered, and the decision might have been put on that ground alone. It was chiefly rested, however, on the ground that, under the words of the present sub-section, services *already rendered* at the desire of the promisor and such services *to be rendered* stood upon the same footing. It would seem that, under the Act, the decision must have been the same on this ground even if the services were rendered at the time gratuitously, though at the desire of the defendant. It was also said that if the services had been rendered without the desire of the defendant the case would be within s. 25 of the Act (see below). As to the conditions of suing in respect of services rendered by the plaintiff *voluntarily* without any request from the defendant see s. 25 of the Act.

“Or does or abstains from doing”: Forbearance as Consideration.—The essence of consideration is that the promisee takes on himself some kind of burden, or “detriment,” as the English authorities call it. Where the consideration is a present performance and not a promise (the only case now before us; promise as a consideration will be dealt with under the following words of this sub-section) the detriment may consist either in actually parting with something of value, or in undertaking a legal responsibility, or in foregoing the exercise of a legal right. It is not common experience that the exercise of one's legal rights is always profitable; nevertheless that

(b) (1895) 20 Bom. 755.

8. 2. which the law deems worthy of its protection must be presumed to be of some value. Thus the performance which constitutes a consideration may be negative as well as positive, provided that the promisee's abstinence from exercising a right was undertaken at the request of the promisor. There need not be a total abandonment of the right, or an undertaking to suspend it for a definite time. Such an undertaking, if it exists, is of course not a performance, but a promise, and then the contract is formed by mutual or reciprocal promises (sub-s. (f), below). The class of cases now before us is that in which the defendant has requested the plaintiff to forbear the enforcement of a claim against him, and has offered a new promise in return, and the plaintiff, without any express acceptance of the defendant's terms, has in fact forbore for an appreciable time. Here the defendant's offer to pay or give security, or as the case may be (c), is accepted by the performance of its conditions (sec s. 8, p. 55, below), and that performance is a good consideration for the defendant's promise. And where the defendant has made an offer to pay in consideration of forbearance, with some other alternative offer, the plaintiff's forbearing to sue in fact is a sufficient acceptance of the first alternative (d). A request to forbear suing or other proceedings, not specifying any length of time, is understood to be a request of forbearance for a reasonable time (e); and this is in fact a common case. If it is asked at what moment the proposal conveyed by such a request becomes a promise, the answer is that it does so whenever the other party has in fact forbore his rights for a time which the Court considers long enough to amount to a reasonable compliance with the request. This appears to be a question of fact depending on all the circumstances, for which no general rule can be laid down. No great difficulty is found, so far as we are aware, in dealing with it in practice. It will be found on examination that in many of the cases where forbearance to sue is said to be the consideration for a promise; that which is really given and

(c) See *Alliance Bank v. Broom* (1864) 2 Dr. & S. 289 as a good example of this class. See also *Fanindra Narain v. Kacheman Bibi* (1918) 45 Cal. 774.

(d) *Wilby v. Elgee* (1875) L. R. 10 C. P. 497.

(e) *Alliance Bank v. Broom*, above; see *Fullerton v. Provincial Bank of Ireland* [1903] A. C. 309, 313, 314; *Glegg v. Bromley* [1912] 3 K. B. 474, 481. See also *Mohes Chandra v. Rajani Kanta* (1915) 22 Cal. L. J. 235; *Fanindra v. Kacheman* (1917) 22 Cal. W. N. 188.

accepted as consideration is a promise to forbear suing either for a definite time or for a reasonable time according to the circumstances, which promise may be express or inferred from the transaction as a whole. Such cases really belong to the following head of contracts by mutual promises. Sometimes it is not easy to say whether, on the facts of a particular case, the consideration is actual forbearance or an agreement to forbear; in other words, whether the promisee sued upon was exchanged for a promise of forbearance, or was an offer to be accepted by forbearance in fact, and became a promise when its condition was fulfilled by the plaintiff's forbearance for the specified time, if any, or otherwise for a reasonable time (*f*).

Compromise.—The most usual and important kind of forbearance occurring in practice is that which is exercised or undertaken by way of compromise of a doubtful claim. It is a question of some importance within what limits the abandonment or compromise of a disputed claim is a good consideration. But this seems to belong not to the definition of Consideration, but to the substantive law declared in s. 25 of the Act. We shall therefore deal with it under that section.

Apparent forbearance when really an act.—Actual performance is sometimes apparently passive. A trader exposes his goods for sale, the price being marked or otherwise well known. A customer comes in, takes the object he wants, and gives his name to the trader. The case is common enough. Here a captiously literal person might say that the consideration on the trader's part is forbearing to interfere with the customer's action. But what we do say, both in law and in common sense, is that the seller, by authorising the buyer to take the goods within his reach, in fact sells and delivers them by the buyer's own hand, and the act, though mechanically the buyer's, is in substance the seller's. This remark is needed only when the sale is on credit. If ready money is expected and given, there is no promise at all in the transaction, and therefore no contract; see the commentary on the next following words.

"Or promises to do or to abstain from doing something": Mutual Promisee.—These words, supplemented by sub-ss. (e) and (f),

(*f*) See per Bowen, L. J., in *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch. D. 266, 289.

S. 2. convey in a somewhat indirect and inconspicuous manner the extremely important proposition that a contract may be formed by the exchange of mutual promises each promise being the consideration for the other. In this case neither promise is of any value by itself, but each of them derives its value from the exchange which makes them both binding. This effect of mutual promises is not a logical deduction from the general notion of consideration (g), but a positive institution of law required by the convenience of business in civilised life. In many archaic systems of law there is no obligation to perform a promise until there has been performance or at least some act done towards performance on the other side. The widespread custom of giving something by way of earnest "to bind the bargain" is a relic of this view.

A consideration which consists in performance (or so far as it consists in performance) is said to be executed. If and so far as it consists in promise, it is said to be executory. Some writers, especially in America (h), speak of a contract in which the consideration on one side is executed as unilateral, and of a contract in which it is executory on both sides as bilateral. This terminology is concise and convenient, but is not at present commonly used in England. It is obvious that the consideration cannot be wholly executed on both sides. For where performances, and performances only, are exchanged, of which a sale of goods over the counter for ready money is a familiar example, nothing remains to be done by either party, and there is no promise at all and nothing for the law to enforce (i).

The proposal to give a promise for a promise is accepted by giving the promise asked for, and thereupon, if there be no special ground of invalidity, the two parties are both bound, each being both promisor and promisee. It does not seem necessary or useful or indeed true to say that the promise of the party who accepts has ever been a proposal, though the language of sub-s. (b) does not seem to recognise the existence of promises which have

(g) For fuller theoretical exposition see Pollock, *Principles of Contract*, 8th ed. 191.

(h) See Langdell, *Summary of the Law of Contracts*, s. 183; Harriman

on Contracts, *passim*.

(i) The possible existence of a collateral promise, e.g., a warranty on sale, does not affect the general truth of this statement.

not passed through that stage. Still it is true that, but for the S. 2. counterpromise or "reciprocal promise" as the Act has it, neither party's "signification of willingness" could become a promise within the definition of the Act; and in this sense we may say, if we please, that the acceptance of an offered promise, by giving the reciprocal undertaking asked for, has itself the nature of a proposal, though it becomes a promise in the act of utterance, and there is no moment at which it exists merely as a proposal. But it does not appear that any thing of practical importance can turn on this.

Promises of Forbearance.—An actual forbearance to exercise a right may be a good executed consideration, provided it be at the promisor's request. So a promise of forbearance may be a good executory consideration. The validity of such considerations, as distinct from their formal definition, will be spoken of, as above mentioned, under s. 25.

"Such act or abstinence or promise is called a consideration for the promise": Further Requirements.—It will be observed that, according to the terms of the definition, it is only required that something—no matter what—should have been done, forborne, or promised at the request of the promisor. We shall find, however, that in some cases expressly provided for by the Act, and in others apparently not so provided for, but well known in the Common Law, and still recognised in Indian practice, the legal effect of consideration in making promises binding is withheld from acts, forbearances, and promises which are within the terms of the definition. English lawyers are accustomed to say, in some at least of such cases, that there is no consideration. This way of speaking would seem to be excluded by the Act. One would expect the Act to say somewhere that, in order to have legal effect, a consideration must not only be something which the promisor asked for and got, but must be "good" or "valuable"; that is to say, something which not only the parties regard, but the law can regard, as having some value (j). This is a fundamental rule in the Common Law. Had the Act abrogated it, the consequences would have been extensive; but it seems to be beyond doubt (notwithstanding the opinion

(j) *Good* consideration was in fact required by the original draft of the Act (s. 10).

8. 2. expressed by Dr. Whitley Stokes, Anglo-Indian Codes, i. 497) that such was not the intention, and that the silence of the Act cannot be taken as altering the English law as it stood settled in British India. The principle may be broadly expressed thus: The law will not enforce a promise given for nothing, and if it is apparent to the Court on the face of the transaction that an alleged consideration amounts to nothing (not merely to very little), then there is no foundation for the promise, and we say either that there is not any consideration or that there is an "unreal consideration." The Act does say in s. 10 that agreements are contracts, *i.e.*, enforceable, if they are (amongst other conditions) made for a lawful consideration. In s. 23 it is declared that certain kinds of consideration are not lawful. In s. 25 agreements made without consideration are declared (special exceptions excepted) to be void. It is not anywhere stated in terms that consideration is not lawful, or otherwise not sufficient, if it is not "good" or "valuable" in the sense which those terms bear in English law. Further explanation is reserved for the commentary on the sections last mentioned.

Sub-ss. (s) to (j): Agreement and Contract.—The group of sub-ss. (e) to (j) may be considered together. By sub-s. (e) an agreement is either a promise or a group of promises (*k*), and, therefore, it would seem that an executed consideration is not reckoned as part of the agreement. This is not according to the current use of language, which treats an agreement as an act of both parties, whether a legal obligation is incurred by one or both of them. A unilateral contract is not the less a transaction between two parties to which both must contribute something. It would not be difficult, however, to find arguments for the language of the Act if required. Sub-s. (f) agrees with common usage, except that the adjective "mutual" is more common in English books.

The distinction between "agreement" and "contract" made by sub-s. (h) is apparently original; it is convenient, and has been adopted by some English writers. The conditions required for an agreement being enforceable by law are contained in Chap. II of the Act, ss. 10 sqq. (pp. 64 sqq., below), where it will also be seen that the absence of any such condition makes an agreement void, and certain

(*k*) See *Abaji v. Trimbak Municipality* (1903) 28 Bom. 66, at p. 72.

defects will make a contract voidable. The duties of parties to a contract are set forth in Chap. IV of the Act. The manner in which contracts are, if necessary, enforced belongs to civil procedure. ss. 2,

For technical reasons, the language of sub-ss. (g) and (i) would not be accurate in England; it would be useless to dwell on this here. The state of things really indicated by sub-s. (i) is that one of the parties (or possibly more) can at his option maintain the contract, or resist its enforcement, or take active steps to set it aside. When rescinded by a party entitled to rescind, it becomes void. Nevertheless it is in the first instance a contract, being valid until rescinded. A contract obtained by fraud is the typical example of a voidable transaction. See ss. 19, 19A, 39; see also ss. 53, 55.

CHAPTER I.

OF THE COMMUNICATION, ACCEPTANCE, AND REVOCATION OF PROPOSALS.

3.—The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Communication, acceptance and revocation of proposals.

What is Communication?—As the words of this section stand it would seem that some sort of communication of a proposal, etc., is made by an act which is intended to communicate it, but in fact has not that effect, and that such an inchoate communication fails to have legal effect only because the specific provisions of s. 4 prevent it from being complete. It would seem both simpler and more rational to say that an act intended to communicate a proposal, etc., but failing to do so, is not a communication at all. To get this sense from the section before us we should have to read “and” for “or” in the last clause. There are not any corresponding words in the Commissioners’ draft.

3. 3. It is matter of the commonest experience that the communication of intentions may be effectually made in many other ways besides written, spoken, or signalled words. For example, delivery of goods by their owner to a man who has offered to buy them for a certain price will be understood by every one, unless there be some indication to the contrary, to signify acceptance of that offer. No words are needed, again, to explain the intent with which a man steps into a ferry-boat or a tramcar, or drops a coin into an automatic machine. It is also possible for parties to hold communication by means of pre-arranged signs not being any form of cipher or secret writing, and not having in themselves any commonly understood meaning. This does not often occur in matters of business. Means of communication which a man has prescribed or authorised are generally taken as against him to be sufficient. Otherwise an unexecuted intention to communicate something, or even an unsuccessful attempt, cannot be treated as amounting to a communication; much less can a mere mental act of assent have such an effect in any case (1).

Communication of special conditions.—In recent times there has been a series of cases in which the first question is whether the proposal of special terms has been effectually communicated. This arises where a contract for the conveyance of a passenger, or for the carriage or custody of goods, for reward, is made by the delivery to the passenger or owner of a ticket containing or referring to special conditions limiting the undertaker's liability, and nothing more is done to call attention to those conditions. English authorities have established that it is a question of fact whether the person taking the ticket had (or with ordinary intelligence would have) notice of the conditions, or at any rate that the other party was minded to contract only on special conditions to be ascertained from the ticket. In either of these cases his acceptance of the document without protest amounts to a tacit acceptance of the conditions, assuming them to relate to the matter of the contract, and to be of a more or less usual kind. But he is not liable if the ticket is so printed, or delivered to him in such a state, as not to give reasonable notice on the face

(1) *Brogden v. Metrop. R. Co.* (1877) 12 Q. B. 691, 692, per Lord Blackburn; and see *Felthouse v. Bindley* (1862) 11 C. B. N. S. 809; 132 R. R. 784, 135 R. R. Preface vii. Finch, Sel. Ca. 51, judgment of Willes, J.

of it that it does embody some special conditions (*m*). In determining these questions the class of persons to whom the special conditions are offered, and the degree of intelligence to be expected of them, may properly be taken into account (*n*). S. 8.

So far as we know, there is only one Indian case hearing directly on the subject. The plaintiff in that case (*o*) purchased of the defendant company a ticket by steamer, which was in the French language. Towards the top of the ticket were words to the effect that "this ticket, in order to be available, must be signed by the passenger to whom it is delivered." At the foot of the ticket there was an intimation in red letters that the ticket was issued subject to the conditions printed on the back. One of those conditions was that the company incurred no liability for any damage which the luggage might sustain. The vessel was wrecked by the fault of the company's servants, and the plaintiff's baggage was lost. The plaintiff sued the defendant company for damages. The ticket was not signed by him, and he stated that he did not understand the French language, and that the conditions of the ticket had not been explained to him. It was held that the plaintiff had reasonable notice of the conditions, and that it was his own fault if he did not make himself acquainted with them. The case of *Henderson v. Stevenson* (*p*) was distinguished on the ground that there the ticket did not disclose on the face of it that there were any conditions on the back, and the plaintiff had no notice of any such conditions. As to the absence of the plaintiff's signature, it was held that the clause requiring the passenger's signature was inserted for the benefit of the company, and that they might waive it if they thought fit. The decision seems also to imply that a French

(*m*) In *Henderson v. Stevenson* (1875) L. R. 2 Sc. & D. 470, where an endorsement on a steamboat ticket was not referred to on its face, and *Richardson v. Rountree* [1894] A. C. 217, where the ticket was folded up so that no writing was visible without opening it, a finding of fact that the passenger knew nothing of any conditions was supported. The correct form of putting the question of fact was laid down by the C. A. in *Parker v. S. E. R. Co.* (1877) 2 C. P. Div. 416. See *Madras Railway Co. v. Govinda*

Rau (1898) 21 Mad. 172, 174, and for a general summary of the law, *Hood v. Anchor Line* [1918] A. C. 837, where both the contract and a notice on the envelope enclosing it pointedly called attention to the conditions.

(*n*) See Lord Ashbourne's remarks in *Richardson v. Rountree*, last note.

(*o*) *Mackillican v. Compagnie des Messageries Maritimes de France* (1880) 6 Cal. 227.

(*p*) (1875) L. R. 2 Sc. & D. 470.

Sec. 3, 4. company is entitled to assume that persons taking first-class passages either know French enough to read their tickets or, if they do not ask for a translation at the time, are willing to accept the contents without inquiry. This seems reasonable enough in the particular case. *Quære*, what presumption is there, if any, as to educated persons, European or otherwise, in British India being acquainted with any particular language?

Incorporation of prospectus in a policy of assurance.—In a recent Madras case (*q*), the question as to the effect to be given to the prospectus of a company which was incorporated by reference in a policy of life assurance arose incidentally in connection with the onus of proof of age of the assured. In the course of the judgment, Bhashyam Ayyangar, J., said: "As regards the effect to be given to the prospectus as a part of the contract of insurance, I think it will have the same effect as if it had been reproduced in the policy itself, and it is quite unnecessary to prove that the prospectus had been read by the assured or that it was specially brought to his notice by the company apart from the reference made to it in the policy itself. A policy of insurance being a contract entered into between the insurers and the assured, and the terms of such contract resting entirely upon the contract itself, and not in the main or even in part upon the common law or upon the statute, the assured, who makes the proposal, enters into the contract, and signs the policy, has in the very nature of things notice that the policy contains all the terms and conditions of the contract." The learned Judge proceeded to cite and rely on *Watkins v. Rymill* (*r*) and the test there laid down (*s*) by Stephen, J.: "Can it be said that the nature of the transaction was such that the plaintiff might suppose not unreasonably that the document (handed to him) contained no terms at all, but was a mere acknowledgment of an agreement not intended to be varied by special terms?"

4.—The communication of a proposal is complete when

| | |
|---------------------------------|--|
| Communication when complete. | it comes to the knowledge of the person to whom it is made. |
|---------------------------------|--|

(*q*) *Oriental Government Security Life Assurance Co., Ltd., v. Narasimha* (1901) 25 Mad. 183, 205, 206. (*r*) 10 Q. B. D. 178; note (*m*), p. 35, above. (*s*) 10 Q. B. D. at p. 189.

The communication of an acceptance is complete,— S. 4.
as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor ;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—
as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it ;

as against the person to whom it is made, when it comes to his knowledge.

Illustrations.

(a) A. proposes, by letter, to sell a house to B. at a certain price.

The communication of the proposal is complete when B. receives the letter.

(b) B. accepts A.'s proposal by a letter sent by post.

The communication of the acceptance is complete,—

as against A., when the letter is posted ;

as against B. when the letter is received by A.

(c) A. revokes his proposal by telegram.

The revocation is complete as against A. when the telegram is despatched.

It is complete as against B. when B. receives it.

This section is really in the nature of an interpretation clause to s. 5 and might, perhaps, have more conveniently followed it.

Agreement between parties at a distance.—No difficulty arises on the first paragraph. Whether a proposal has or has not come to the knowledge of the person to whom it was made is purely a question of fact. The rest of the section is intended, as shown by the illustrations, to meet the questions raised by the formation of agreements between parties at a distance. It has done this, as regards acceptance by enacting (in combination with s. 5) that for a certain time—namely, while the acceptance is on its way—the receiver shall be bound and the sender not. The proposal becomes a promise before it is certain that there is any consideration for it. This can be regarded only as a deliberate and rather large departure, for reasons of convenience, from the common law rule which requires the promise

8. 4. and the consideration to be simultaneous. No such departure has been found necessary in England. The case of an acceptance being "put in a course of transmission to" the proposer, but failing to reach him, is not expressly dealt with. It seems to result from the language of the second paragraph that the proposer must be deemed to have received the acceptance at the moment when it was despatched so as to be "out of the power of the acceptor," and that accordingly it becomes a promise on which the acceptor can sue, unless some further reason can be found why it should not. If the consideration on the acceptor's part was not promise but performance—for example, the sale of goods despatched at the proposer's request without previous negotiation—the failure of consideration may supply such a reason in the case proposed. The Act certainly does not say that the intending purchaser must be deemed to have received goods which have never arrived; it says at most that he must be deemed to have been aware of their despatch. But if the consideration on the acceptor's part was a promise, it would seem that the proposer cannot say he has not received that consideration; for he cannot say that the acceptance has not been communicated to him, and there is no difference between having the communication of a promise and having the promise itself. Consequently, where the agreement is to consist in mutual promises, a binding contract appears to be formed by a letter of acceptance despatched in the usual way, even if it does not arrive at all, unless the proposal was expressly made conditional on the actual receipt of an acceptance within a prescribed time, or in due course, or unless the acceptor sends a revocation as provided for by the latter part of the section and explained by illustration (c). This last qualification is probably, though not certainly, a departure from English law. Apart from the question of a possible revocation, the total result, on the words of the Act, is in accordance with the existing English authorities. Those authorities, however, are of later date than our Act, and in 1872 the current of opinion was rather the other way. It seems uncertain whether the framers of the Act really omitted to consider the case of an acceptance not arriving at all, or meant it to be an implied exception, on the ground that the want of any final consent between the parties (see s. 10) would prevent the formation of a contract, or how otherwise. The draft of 1866 appears to have

assumed that actual communication was necessary (t). When the proposal and acceptance are made by letters, the contract is made at the time when and the place where the letter of acceptance is posted (u). S. 4.

English rules.—The rules as now settled in England are as follows:—

“A person who has made an offer must be considered as continuously making it until he has brought to the knowledge of the person to whom it was made that it is withdrawn (v). In other words, the revocation of a proposal is effectual only if actually communicated before the despatch of an acceptance; and the time when the revocation was despatched is immaterial (w). But where an acceptance, without notice of the offer being revoked, is despatched in due course by means of communication, such as the post, in general use and presumably within the contemplation of the parties, the acceptance is complete from the date of despatch, notwithstanding any delay or miscarriage in its arrival from causes not within the acceptor’s control” (x). It seems (y) this is independent of the rule that, if the proposer of an agreement has prescribed or authorised any particular

(t) “3. A proposal to enter into a contract may be retracted, or the terms of it altered by the party making it, at any time before it is accepted.

“*Explanation.*—A proposal is said to be accepted when an expressed acceptance of it has been communicated to the proposer, or when a letter of acceptance is posted or a telegraphic message delivered at the proper office, and the acceptance by letter or telegram is not cancelled by some communication which reaches the proposer before or at the same time with the letter or telegram of acceptance, or when acceptance is to be inferred from the circumstances of the case.”

(u) *Kamisetti Subbiah v. Katha Venkataswamy* (1903) 27 Mad. 355. English authority, so far as it goes, is to the same effect.

(v) Lord Herschell in *Henthorn v.*

Fraser [1892] 2 Ch. 27, 31; Finch, Sel. Ca. 148, confirming *Byrne v. Van Tienhoven* (1880) 5 C. P. D. 344.

(w) It is literally possible to read the words of s. 4 of the Act, par. 3, as giving only one chance of sending a revocation, so that if a man first sends a written acceptance by a slow ship, then sends a written revocation by a faster ship, and then returns to his first mind and confirms the acceptance by a telegram arriving before either letter, the revocation is operative, and the confirmation cancelling it is not. But this cannot be seriously entertained, and seems sufficiently excluded by the terms of s. 5.

(x) *Henthorn v. Fraser*, note (v) above; *Household Fire, etc., Insurance Co. v. Grant* (1879) 4 Ex. D. 216; Finch, Sel. Ca. 133.

(y) *Henthorn v. Fraser*.

8. 4. mode of communicating acceptance (*cf.* s. 7, sub-s. 2), he cannot dispute the sufficiency of that mode, and must take any risks of delay or miscarriage attaching to the acceptor's action in conformity with the request or authority.

A letter of acceptance misdirected by the acceptor's fault cannot be deemed to have been effectually put in a course of transmission to the proposer (z); this case was properly distinguished by the Allahabad High Court from that of an insufficient address furnished by the proposer himself (a). There the proposer's own want of care obviously cannot extenuate, but will if possible aggravate, the risk imposed on him by the general rule of law.

Whether a particular letter or writing has been posted, delivered, or actually received by the addressee, is a question of fact having no more to do with the law of contract than any other matter of fact which it may be needful to prove in order to establish or contradict the formation of any kind of contract (b).

It is not thought useful for Indian purposes to enter upon the history of the English doctrine, or to discuss the earlier cases, whose results, so far as not overruled, are embodied in later decisions (c).

Revocation arriving before Acceptance.—One point remains unsettled in England. It has never been decided whether, a letter of acceptance having been despatched by post, a telegram revoking the acceptance and arriving before the letter is operative or not. A negative answer seems to be required by the reasoning of the English decisions (d). If it can be said that every acceptance in writing is subject to an implied condition that it may be cancelled by a revocation arriving sooner or at the same time, it might as easily be held that every proposal expecting an answer by letter includes a condition that the answer shall actually be received in due course. But this suggestion has been definitely rejected.

(z) *Ram Das v. Official Liquidator Cotton Ginning Co., Ltd.* (1887) 9 All. 386, 385.

(a) *Townsend's Case* (1871) L. R. 13 Eq. 148. Several dicta in this case are founded on authority since overruled; the decision is good law, though it would now be put on shorter grounds.

(b) *Cf.* Evidence Act, ss. 16 and 114.

(c) See Appendix to Pollock, Principles of Contract, 8th ed. p. 724.

(d) See especially the judgment of Thesiger, L.J., in *Household Fire Insurance Co. v. Grant*, 4 Ex. Div. at p. 222; Finch, Sel. Ca. at p. 137.

In British India, however, such a revocation is made valid by the express terms of ss. 4 and 5 of the Act (e). Ss. 4, 5.

- 5.—A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
- Revocation of proposals and acceptances.

An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustration.

- A. proposes, by a letter sent by post, to sell his house to B.
- B. accepts the proposal by a letter sent by post.
- A. may revoke his proposal at any time before or at the moment when B. posts his letter of acceptance, but not afterwards.
- B. may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A., but not afterwards.

Revocation of Offers.—It is implied in this section that the proposer of a contract cannot bind himself (unless by a distinct contract made for a distinct consideration) to keep his offer open for any definite time, and that any words of promise to that effect can operate only for the benefit of the proposer and as a warning that an acceptance after the specified time will be too late (s. 6, sub-s. 2). Such is undoubtedly the rule of the Common Law. The reason is that an undertaking to keep the offer open for a certain time is a promise without consideration; and such a promise is unenforceable. A. gives an undertaking to B. to guarantee, for twelve months, the due payment of M.'s bills, which may be discounted by B. at A.'s request. This is not a binding promise, but a standing proposal which becomes a promise or series of promises as and when B. discounts bills on the faith of it. A. may revoke it at any time, subject to his obligations as to any bills already discounted. "The promise"—or rather offer—"to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which

(e) The Indian rule agrees with a Scottish decision which is apparently still followed in Scotland; *Countess of Dunmore v. Alexander* (1830) Finch, Sel. Ca. 120. This is under a different system of law.

- S. 5. his liability cannot extend" (f). Z. offers to take A.'s house on certain terms, an answer to be given within six weeks. A. within that time, writes Z. a letter purporting to accept, but in fact containing a material variation of the terms (see s. 7, sub-s. 1, below); Z. then withdraws his offer; A. writes again, still within the six weeks, correcting the error in his first letter and accepting the terms originally proposed by Z. No contract is formed between Z. and A., since A.'s first acceptance was insufficient, and the proposal was no longer open at the date of the second (g). On the same principle it was held by the High Court of Madras that a proposal to sell goods allowing eight days' time for acceptance may be revoked within the eight days unless the promise to keep the offer open was supported by consideration (h).

Sale by Auction, etc.—The liberty of revoking an offer before acceptance is well shown in the case of a sale by auction. Here the owner of each lot put up for sale makes the auctioneer his agent to invite offers for it, and "every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to." Hence a bidder may withdraw his bid at any moment before the fall of the hammer (i). It is common to insert in conditions of sale a proviso that biddings shall not be retracted, but it seems that such a condition is inoperative in law (j), for a one-sided declaration cannot alter the bidder's rights under the general law, nor is there any consideration for his assenting to it, even if he could be supposed to assent by attending the sale with notice of the conditions.

The English rule that a bid may be withdrawn at any time before

(f) *Offord v. Davies* (1862) 12 C. B. N. S. 748; 133 R. R. 491. The much-discussed earlier case of *Cooke v. Oxley* (1790) 3 T. R. 653; 1 R. R. 783; is now received authority only so far as it decides this: See *Stevenson v. McLean* (1880) 5 Q. B. D. 348, 351; *Head v. Diggon* (1828) 3 M. & R. 97 (in which the parties were face to face, and it is not clear whether the defendant did or did not signify his revocation before the plaintiff signified his acceptance) cannot be taken as going farther. The reason there given is clearly wrong, for it is

supposed that on the acceptance of a proposal it is necessary for the proposer to make some fresh declaration of consent, which is contrary both to principle and to all recent authority.

(g) *Routledge v. Grant* (1828) 4 Bing. 653; 29 R. R. 672.

(h) *Schoulank v. Muthunagana Chetti* (1892) 2 Mad. L. J. 57.

(i) *Payne v. Cave* (1789) 3 T. R. 148; 1 R. R. 679.

(j) Such was Lord St. Leonards' opinion: *Dart*, V & P. 6th ed. i. 139.

the fall of the hammer is followed in British India (*k*). When the bid of an agent at an auction sale was accepted by the auctioneers *kutchapucca* (subject to sanction of the owner of the goods), and the agent agreed thereto, it was held that this did not preclude the principals of the agent from exercising their right of retracting the bid before it was accepted by the auctioneers (*l*). In this case an attempt was unsuccessfully made to prove a usage of trade according to which, if a bid were accepted *kutchapucca*, the bidder could not retract it until it had been finally accepted or refused. If such a usage were established, it would have been, no doubt, inconsistent with the terms of the present section. But, so far as the express enactments of the Act are concerned, such a usage is saved by the last clause of s. 1. It would remain to be seen whether it would not be disallowed as contrary to the general principles of the law. S. 5.

Standing Offers.—A writing whereby A. agrees to supply coal to B. at certain prices and up to a stated quantity, or in any quantity which may be required, for a period of twelve months, is not a contract unless B. binds himself to take some certain quantity, but a mere continuing offer which may be accepted by B. from time to time by ordering goods upon the terms of the offer. In such a case, each order given by B. is an acceptance of the offer; and A. can withdraw the offer, or, to use the phraseology of the Act, revoke the proposal, at any time before its acceptance by an order from B. (*m*). Such a transaction may be reduced to a statement by the intending vendor in this form: "If you will send me orders for coal, I shall supply it to you for a period of twelve months at a particular rate." This is merely a proposal from A. to B. If, in reply to such a proposal, B. says to A., "I agree," it does not constitute an acceptance of the proposal. An acceptance can take place only by B. sending an order to A. If, however, there is an undertaking on the part of B. not to send orders for coal (or whatever the goods in question may be) to any other person than A. during a specified time, there is a good consideration for a promise by A. to supply such coal as B.

(*k*) *Agra Bank v. Hamlin* (1890) 14 Mad. 235. *Wadia & Co.* (1899) 24 Bom. 97, following *G. N. R. Co. v. Witham* (1873)

(*l*) *Mackenzie v. Chamroo* (1889) 16 Cal. 702. L. R. 9 C. P. 18; *Kundan Lal v. Secretary of State for India* (1904) Funj.

(*m*) *The Bengal Coal Co. v. Homee*, Rec. no. 72.

8. 5. may order on the specified terms and up to the specified extent. The same principle has been affirmed by the Judicial Committee on an appeal from the Province of Quebec, where French-Canadian law, now codified, is in force. A printer covenanted to execute for the Government of the Province, during a term of eight years, the printing and binding of certain public documents on certain terms expressed in a schedule. In the course of the same year the Lieutenant-Governor cancelled the agreement. The printer sued the Crown by petition of right, and it was ultimately held, reversing the judgment below, that he had no ground of action.

"The contract . . . does not purport to contain any covenant or obligation of any sort on the part of the Crown. The respondent undertakes to print certain public documents at certain specified rates. For all work given to him on the footing of the contract the Government was undoubtedly bound to pay according to the agreed tariff. But the contract imposes no obligation on the Crown to pay the respondent for work not given to him for execution. There is nothing in the contract binding the Government to give to the respondent all or any of the printing work referred to in the contract, nor is there anything in it to prevent the Government from giving the whole of the work, or such part as they think fit to any other printer" (u).

In another similar case in England where a town council had accepted a tender for the supply of certain goods for twelve months a Divisional Court held that a contract was formed by the acceptance of the tender (o). One of the Judges thought there was an implied obligation on the council's part not to order goods of that kind elsewhere during the term. The case before the Judicial Committee which we have just mentioned was not cited. Unless some sufficient distinction can be discovered in the facts (which the present writer has failed to do), it is submitted that this judgment is contrary to both principle and authority, and ought not to be followed.

(u) *R. v. Demers* [1900] A. C. 103, 108. English authorities on the point (which in the Province of Quebec could have only a "persuasive" authority) were not referred to.

(o) *Gloucester Municipal Election Petition* [1901] 1 K. B. 683. The point

arose in a curious manner, the question being whether the tradesman had an interest in a contract with the council (apart from any goods being actually ordered) which disqualified him for election as a town councillor.

Advertisements of rewards and other so-called "general offers" Ss. 5, 6
 have also raised questions whether particular acts were proposals of
 a contract capable of being promises by acceptance, or merely the
 invitation of proposals. This will be more conveniently dealt with
 under s. 8.

6.—A proposal is revoked—

- (1) by the communication of notice of
- Revocation how
made. revocation by the proposer to the other
party ;
- (2) by the lapse of the time prescribed in such proposal
 for its acceptance, or, if no time is so prescribed,
 by the lapse of a reasonable time, without com-
 munication of the acceptance ;
- (3) by the failure of the acceptor to fulfil a condition
 precedent to acceptance ; or
- (4) by the death or insanity of the proposer, if the fact
 of his death or insanity comes to the knowledge
 of the acceptor before acceptance.

Notices of Revocation.—Here sub-s. 1 appears to make it a condition of revocation being effectual that it shall be communicated by the proposer or (which is the same thing) by his authority. This was probably intended to correspond with the law of England, but a few years after the Act was passed the Lords Justices James and Mellish in *Dickinson v. Dodds* (*p*) used language apparently involving a different rule, though that case actually decided only that if an owner of immovable property makes a proposal to sell it to one man, and before that proposal is answered agrees to sell it to another, and the first, with the knowledge of this fact, then formally tenders an acceptance, the purchaser who first actually accepts has the better right to specific performance. It was not decided, though the Judges seem to have thought, that knowledge, not communicated by the proposer, that the property was sold to some one else, was such a revocation of the first proposal as in itself made acceptance by the person to whom it was made impossible. Acceptance of a proposal which the proposer has made it impossible to fulfil is not necessarily unmeaning

(*p*) (1876) 2 Ch. Div. 463.

8. 6. or inoperative; the fact that an obligation cannot be specifically performed is consistent with the promisor being bound to pay damages for his default. Many obligations are from the first incapable of specific performance so far as any power of the Court is concerned. It would be absurd to hold that a promisor is to go scot-free because by his own action he has reduced the possibilities of his obligation from a higher to a lower level. The reasons given for the decision in *Dickinson v. Dodds* have been freely criticised in England; but, as the decision itself is not of positive authority in British India in a matter covered by the terms of the Contract Act, it does not seem useful to pursue the discussion here. The true principle of such cases is stated by Langdell (q): "An offer to sell property will not be revoked by a sale of the property to some one else. As evidence of a change of mind on the part of the offeror, such an act cannot be put higher than a letter of revocation sent to the offeree by mail; and yet it is well settled that a letter of revocation will not be operative until it is received by the offeree (r). Nor will the subsequent sale of the property to some one else constitute any legal obstacle to the continuance of the offer. The original offeree and the subsequent purchaser cannot, indeed, both acquire the property, but they can both acquire a right to it as against the seller, together with the alternative right to damages; and this is all that a contract secures to one in any case." It has, indeed, been suggested by writers entitled to respect (s) that an act of the proposer inconsistent with his original intention will be operative, if it comes in any way to the knowledge of the offeree, as an act which, under s. 3, "has the effect of communicating" a revocation of the proposal. If this were so, *Dickinson v. Dodds* would be good law in British India to the full extent of the reasons there given. But, with all submission, the act of selling to one man property already offered to another cannot be itself an act which has the effect of communicating notice to that other. Such notice must be the effect of some other act or event. As in *Dickinson v. Dodds*, a stranger may inform the original offeree that

(q) Summary of the Law of Contracts, Boston (Mass.), 1880, s. 181.

(r) A cheque is not effectually countermanded by a telegram delivered at the bank on which it is drawn but not

in fact brought to the banker's notice: *Curtice v. London City & Midland Bank* [1908] 1 K. B. 293, C. A.

(s) Cunningham and Shephard's Indian Contract Act, 9th ed. p. 25.

the new transaction, or some such transaction, has taken place. S. 6.
This is no act of the party supposed to be revoking, and therefore its effect, if any, cannot depend on the words of s. 3. It is perhaps needless to consider what would be the result if the first offeree in person were to overhear a conversation between the vendor and the new purchaser constituting an agreement inconsistent with the first offer. We have already expressed a doubt whether the true meaning of s. 3 was to ascribe the effect of communicating proposal, revocation, or acceptance, to acts done without any such intent. On the whole, we are unable to follow the learned commentators to whose interpretation we have referred.

Revocation not presumed.—As Lord Justice James said, “*primâ facie* every contract is permanent and irrevocable, and it lies upon a person who says that it is revocable or determinable to show either some expression in the contract itself, or something in the nature of the contract, from which it is reasonably to be implied that it was not intended to be permanent and perpetual, but was to be in some way or other subject to determination” (1). This dictum, and the Indian case cited in our note, really belong to the subject of interpretation, in cases where it is alleged that an option to determine a completed contract is conferred by the terms of the contract itself. But the principle that an intent to revoke what has once been deliberately uttered will not be lightly presumed or too readily inferred appears to be equally applicable to proposals. Moreover, the Act does not

(1) *Llanelly Ry. and Dock Co. v. L. & N. W. R. Co.* (1873) L. R. 8 Ch. 942, 949. Accordingly, where a contract was made between the widow of a Gayawal priest and the defendant whereby the widow adopted the defendant, a married man, as her son in order that the defendant might get his feet worshipped by the *clientèle* of her deceased husband and receive emoluments from them for the benefit of himself and the widow, and the contract itself specified the circumstances under which it might be cancelled, it was held that, though the adoption was invalid, the contract was not determinable

at the mere choice of the widow so as to affect the rights created thereby in favour of the defendant. The Court said: “We are unable to accept the suggestion that the contract in this case was a contract of service, terminable upon reasonable notice. The contract itself indicates some of the circumstances under which it may be terminated, and it is impossible to hold that the parties intended that the contract should be terminable merely at the option of one of the parties”: *Lachmi Dai Mohutain v. Kissen Lall* (1906) 11 C. W. N. 147, citing James, L.J., as above.

5. 6. explicitly deal with interpretation anywhere. The Lord Justice went on to point out that many contracts, those of employment, agency, and the like, are by their nature not expected to be of indefinite duration. The agreement before him was an agreement for running powers between two railway companies.

Lapse of time for Acceptance.—The rule laid down by sub-s. 2 is now elementary. We have already had to cite some of the authorities which recognise it. On the point of an acceptance after the expiration of a reasonable time being too late, there is one direct English authority, where it was held that a person who applied for shares in a company in June was not bound by an allotment made in November (*u*). In a recent English company case an underwriting letter contained the words "This engagement is binding on me for two months"; they were incapable of operating as a promise, and it was held, with some doubt, that their real effect was an offer with a limit of two months for acceptance (*v*).

Condition precedent to Acceptance.—As to sub-s. 3, it is not very easy to see what a condition precedent to acceptance means. The words (like several other of the less felicitous phrases in the Act) appear to have been borrowed without much reflection from the draft Civil Code of the State of New York, completed in 1865 and never adopted in its own State. There is nothing in the original context to throw light on them. A man proposing a contract may request either a single act, or several acts, or a promise or set of promises, or both acts and promises, as the consideration for a promise which he offers. The other party may do something obviously inconsistent with performing some or one of the things requested. This amounts to a tacit refusal, and accordingly the proposal is at an end (see p. 42, above), and the parties can form a contract only by starting afresh. If the fact amounts to a refusal, there is no manifest reason for calling it failure to fulfil a condition precedent. The term is not used in this connection in English books. Everything required on the acceptor's part to complete an acceptance would rather seem to be part of the acceptance itself. This sub-section does not appear to have been judicially interpreted, or indeed to have any very material effect.

(*u*) *Ramsgate Victoria Hotel Co. v. Montefiore* [1866] L. R. 1 Ex. 109. (*v*) *Hindley's Case* [1896] 2 Ch. 121 C. A.

Death or insanity of proposer.—The provision made by **ss. 6, 7** sub-s. 4 is quite clear. It is a variation from English law, where on the one hand it is understood that “the death of either party before acceptance causes an offer to lapse,” without any qualification as to notice, and on the other hand it does not seem that supervening insanity of the proposer operates as a revocation at all, since the contract of a lunatic is only voidable and not void. If an offer is addressed to a man who dies without having accepted or refused it, his executors have no power to accept it either in England or in British India. For the proposer cannot be presumed to have intended to contract with a deceased person’s estate. This is very different from the case of one who accepts a proposal without knowing that the proposer is dead.

7.—In order to convert a proposal into a promise, the acceptance must—

Acceptance
must be absolute.

(1) be absolute and unqualified ;

(2) be expressed in some usual and reasonable manner, unless the proposal prescribes the manner in which it is to be accepted. If the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may, within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise ; but if he fails to do so he accepts the acceptance.

Certainty of Acceptance.—The rule of the first sub-section is in itself obviously necessary, for words of acceptance which do not correspond to the proposal actually made are not really an acceptance of anything, and, therefore, can amount to nothing more than a new proposal, or, as it is frequently called, a counter-offer. The difficulties which occur under this head are difficulties not of principle but of construction, the question being in every case whether a particular communication is to be understood as a real and absolute acceptance, or as introducing a condition or qualification which makes it only a stage in a course of negotiation capable of leading, but not necessarily

8. 7. leading, to a concluded contract. Sometimes additional words that seem at first sight to make the acceptance conditional are no more than the expression of what the law implies, as where in England an offer to sell land is accepted "subject to the title being approved by our solicitors." The reasonable meaning of this appears to be not to make a certain or uncertain solicitor's opinion (which might be arbitrary) final, but only to claim the purchaser's common right of investigating the title with professional assistance and refusing to complete if the title proves bad (*w*). On the other hand, reference to special conditions not known to the other party (*x*), as distinguished from terms already made part of the proposal (*y*), will prevent an acceptance from being final. So will a reference to future unspecified terms "to be arranged," or the like, between the parties or their agents (*z*). But an acceptance on condition, coupled with an admission that the condition has been satisfied, may be in effect unconditional (*a*).

Although there can be no contract without a complete acceptance of the proposal, it is not universally true that complete acceptance of the proposal makes a binding contract; for one may agree to all the terms of a proposal, and yet decline to be bound until a formal agreement is signed (*b*), or some other act is done. This is really a case of acceptance with an added condition, but of such special importance as to call for separate mention. There may be an express reservation in such words as these: "This agreement is made subject to the preparation and execution of a formal contract" (*c*).

(*w*) *Hussey v. Horne-Payne* (1879) 4 App. Ca. 311, 322, per Lord Cairns: (followed, *Treacher & Co. v. Mahomedally* (1911) 35 Bom. 110.) The decision of the C. A., who had taken a different view on this point, was affirmed on other grounds.

(*z*) *Jones v. Daniel* [1894] 2 Ch. 332.

(*y*) *Filby v. Hounsell* [1896] 2 Ch. 737.

(*c*) *Honeyman v. Marryatt* (1857) 6 H. L. C. 112; *Stanley v. Dowdeswell* (1874) L. R. 10 C. P. 102.

(*a*) *Roberts v. Security Co.* [1897] 1 Q. B. 111, C. A. The principle is sound but its application in the parti-

cular case doubtful; see *The Equitable Fire and Accident Office v. The Ching Wo Hong* [1907] A. C. 96, 101.

(*b*) "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation": *Chinnock v. Marchioness of Ely* (1865) 4 D. J. S. 638, 646.

(*c*) *Winn v. Bull* (1877) 7 Ch. D. 29; Finch. Sel. Ca. 81, followed in *Hatzfeldt-Wildenburg v. Alexander* [1912] 1 Ch. 284.

Or a proposal for insurance may be accepted in all its terms, but with the statement that there shall be no assurance till the first premium is paid. Here again there is no contract, but only a counter-offer, and the intending insurer may refuse a tender of the premium if there has meanwhile been any material change in the facts constituting the risk to be insured against (d). Where there is no precise clause of reservation, but the acceptance is not obviously unqualified, it becomes a question of construction whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail (e), and this must be determined by examination of the whole of a continuous correspondence or negotiation. It will not do to pick out this or that portion which, if it stood alone, might be sufficient evidence of a contract (f). But where it appears that a complete contract was formed by unqualified acceptance of an offer at a certain date, subsequent negotiations will have no effect unless they amount to a new agreement (g).

In British India it has been laid down, in accordance with English law as well as with the terms of the Act, that an acceptance with a variation is no acceptance; it is simply a counter-proposal, which must be accepted by the original promisor before a contract is made (h). Thus where an offer was made for the purchase of certain goods which were to be ordered out from Europe, and the offer was accepted "free Bomhay Harbour and interest," being a term not contained in the offer, it was held that there was no acceptance within the meaning of this section. Where a buyer signed a bought note after inserting therein in Chinese certain terms which were not in the sold note previously signed by the seller, it was held that there was no

(d) *Canning v. Farquhar* (1886) 16 Q. B. Div. 727; see especially per Lindley, L. J., at p. 733.

(e) *Jessel, M. R.*, in *Winn v. Bull*, note (c) above.

(f) *Hussey v. Horne-Payne* (1879) 4 App. Cas. 311; *Aryodaya S. & W. Co. v. Jai alprasad* (1903) 5 Bom. L. R. 909.

(g) *Perry v. Suffields Ltd.* [1916] 2

Ch. 187, C. A.

(h) *Per Cur.*, *Haji Mahomed v. Spinner* (1900) 24 Bom. 510, 523. Here the plaintiffs maintained that the additional term was already implied in the offer by a previous course of dealing or otherwise. The defendant maintained that there was a contract without that term. The Court held that there was no contract at all.

8. 7. contract unless the seller accepted the additional terms in Chinese (a). In such a case the acceptance with a qualification is in its nature a counter-proposal which, if accepted by the proposer, would constitute an agreement (j). The English authorities have also been followed on the point that parties are free to provide that the agreement shall not be complete and operative until its terms are reduced into writing, or are embodied in a formal document, and that it is a question of interpretation whether they have done so or not. Where, however, there is no such stipulation express or implied, the mere circumstance that the parties *desire* to put the agreement into writing or in a formal instrument will not prevent the agreement from being enforced, assuming, of course, that an agreement otherwise complete and enforceable is proved (k). The circumstance that the parties do intend a subsequent agreement to be made is evidence to show that they did not intend the previous negotiations to amount to an agreement, though not conclusive; they will be bound by a previous agreement "if it is clear that such an agreement has been made" (l). Where, however, the formalities are not of the parties' selection, so that nothing turns upon the intention of the parties, no inference against a concluded agreement can be drawn from the non-completion of these formalities. Thus while a suit was pending the parties entered into a written agreement whereby the plaintiff agreed to accept the property of the defendant in adjustment of the suit. The agreement was not recorded as required under s. 98 of the Code of Civil Procedure then in force, being Act VIII of 1859 [now Code of Civil Procedure, 1908, O. 21, r. 2]. It was not, therefore, such a final adjustment of the suit as precluded the case from being proceeded with. The plaintiff, taking advantage of that fact, proceeded with the suit, and obtained a decree against the defendant. The defendant subsequently brought a suit against the plaintiff for damages for breach of the agreement; and it was

(i) *Ah Shain Shoke v. Moothia Railway Co.* (1887) 2 App. Ca. 666; *Chetty* (1899) 4 C. W. N. 453. *Lewis v. Brass* (1877) L. R. 3 Q. B. D.

(j) *Bhagwandas v. Shiv Dial* (1913) 687; *Bonnevell v. Jenkins* (1878) L. R. 8 Ch. D. 70. *Punj. Rec.*, no. 92, where the counter-proposal was accepted.

(k) *Whympster v. Buckle* (1879) 3 All. 469, citing *Brogden v. Metropolitan* (1856—7) 6 H. L. C. 238, 264.

(l) *Ridgway v. Wharton* (1856—7) 6 H. L. C. 238, 264.

held that he was entitled to damages, there having been a binding agreement between the parties, though the formality of recording the agreement was not completed (m). Such cases, however, must be distinguished from those where the negotiations have not led to a concluded agreement. Thus in *Koylash Chunder v. Tariney Churn* (n) the defendant wrote to the plaintiff: "The value of your house has been fixed through the broker at Rs. 13,125. Agreeing to that value, I write this letter. Please come over to the office of my attorney between three and four this day with the title deeds of the house and receive the earnest." In reply the plaintiff wrote: "You having agreed to purchase our house for Rs. 13,125, have sent a letter through the broker, and we are agreeable to it, and we will be present between three and four this day at your attorney's, and receive the earnest." The plaintiff and the defendant met at the attorney's office, but the attorney was absent, and accordingly no inspection of title deeds or payment of the earnest money took place. The plaintiff sued the defendant for specific performance, but it was held that there was no binding contract, as two important matters—namely, inspection of the deeds (o) and the amount and payment of the earnest money—were left to be arranged at the attorney's office. Garth, C.J., said: "As regards the earnest money, it must be observed that both parties treat that as an element in the bargain. . . . Supposing the meeting had taken place, and the parties had been unable to agree as to the amount of the earnest money, how could it possibly have been said that they had arrived at any binding agreement?" (p).

(m) *Thota Venkateshadasami v. Kristnasawmy* (1874) 8 M. H. C. 1. See Mulla's Code of Civil Procedure, 6th ed. pp. 480, 481.

(n) (1884) 10 Cal. 588.

(o) It looks as if there had been some misapprehension here. In English practice, at any rate, a contract for purchase of land is not suspended until the title has been shown; there is a complete contract as soon as all the terms—including special conditions, if any, as to title—have been agreed upon, subject to the purchaser's right to rescind, or to compensation, if a title

shown according to the contract, and often, by agreement, to the vendor's right to rescind if he cannot remove any objection.

(p) It looks very much as if some well-known customary proportion of earnest money was really intended by the parties, but apparently there was no proof of this. In *Sreegopal v. Ramchurn* (1882) 8 Cal. 856, a document purporting to be an agreement relating to the sale of a house was made "subject to the approval of the purchaser's solicitor," and it was held, citing *Hudson v. Buck*, 7 Ch. D. 683, and *Hussey*

8. 7. A provision in an agreement for the sale of a house that "on approval of the title by the purchaser's solicitor the purchase money should be paid" has not the effect of rendering the completeness of the agreement conditional upon the approval of the title by the solicitor, but of simply fixing the time for the payment of the purchase money without waiting for a conveyance (*q*).

Apparent without real Acceptance.—In exceptional circumstances there may be an unconditional acceptance in terms of a proposal which in fact the parties do not understand in the same sense, and which neither party is estopped from understanding in his own sense. Here the acceptance is merely apparent, and no contract is formed. Such cases are better postponed till we come to s. 13, which see.

Manner of Acceptance (sub-s. 2).—A proposal must be accepted according to its terms. Therefore, if the proposer chooses to require that goods shall be delivered at a particular place, he is not bound to accept delivery tendered at any other place (*r*). It is not for the acceptor to say that some other mode of acceptance which is not according to the terms of the proposal will do as well.

The present sub-section, however, throws on the proposer the burden of notifying to the acceptor that an acceptance not in the prescribed manner and form is insufficient, and he remains bound if

v. Horne-Payne (in C. A.), 8 Ch. D. 670, that there was no complete contract between the parties until the title was approved by the purchaser's solicitor, who was for that purpose constituted the sole and absolute judge as to whether or not there was a good title, provided he acted reasonably and *bona fide*. This case seems, however, of doubtful authority, as Wilson, J., did not feel free to follow the opinion expressed by Lord Cairns in *Hussey v. Horne-Payne* in the House of Lords (see p. 50, above), which would presumably be upheld by the Judicial Committee. It would be a misfortune to Indian jurisprudence if English decisions made with regard to the very peculiar English con-

ditions of land title and transfer were to be followed literally and indiscriminately by the Indian Courts.

(*q*) *Cohen v. Sutherland* (1890) 17 Cal. 919.

(*r*) *Eliason v. Henshaw* (1819) Sup. Ct. U. S., 4 Wheaton, 225; Finch, Sel. Ca. 56. A communication by post of any demand or offer generally authorizes the post as a proper mode of conveying the answer, but a general authority to pay a sum due by remittance through the post will not authorize the unusual practice of enclosing considerable sums of coin or negotiable notes in a post letter: *Mitchell Henry v. Norwich Union Society* [1918] 2K 7, C. A.

he fails to insist on an acceptance such as he required. No previous §s. 7,
or subsequent authority for this has been found in the Common
Law, nor does analogy seem to favour it.

At all events, one party to a negotiation cannot impose on the other the burden of expressly refusing either an original offer or a counter-offer by saying that he will assume acceptance unless he hears to the contrary (s). Assent to his terms is a positive act within the other party's discretion, and he has no right to presume it. Neglect to answer a business offer is certainly not, as a rule, prudent or laudable; still there is no legal duty to answer at all.

8.—Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

Acceptance by
performing condi-
tions, or receiving
consideration.

General Offers.—The terms of this section are very wide. Nothing like them occurs in the original draft of the Indian Law Commissioners, nor, so far as known to us, in any authoritative statement of English law. They appear to have been taken from the draft Civil Code of New York, with slight verbal alteration. In the absence of illustrations, their intended scope is not very clear. It seems, however, fairly certain that the division of the subject-matter of the section into two branches, "performance of the conditions of a proposal" and "acceptance of any consideration for a reciprocal promise which may be offered with a proposal," corresponds to the general division of proposals into those which offer a promise in exchange for an act or acts and those which offer a promise in exchange for a promise. We have already noted on s. 2 (a) and (h) (p. 15, above) that the word *proposal*, as defined by the Act, seems to be limited to the offer of a promise. Accordingly "performance of the conditions of a proposal" seems to be nothing else than doing the act requested by the proposer as the consideration for the promise offered by him, as when a tradesman sends goods on receiving an order from a customer. The only previous definition of acceptance

(s) *Felthouse v. Bindley* (1862) 11 Sol. Ca. 51 *Cp. Haji Mahomed v. C. B. N. S.* 869; 132 R. R. 784; *Finch, Spinner* (1900) 24 Bom. 510, 524.

8. 8. in the Act is that a proposal is said to be accepted when the person to whom it is made "signifies his assent thereto" (s. 2 (b)). This has to be read with the provisions as to communication in ss. 4 and 7. So far there might have been doubt whether acceptance can ever be binding without communication; and, indeed, the present section does not expressly dispense with communication in any case. Nevertheless it appears, in its first branch, to recognise the fact that in the cases in which the offeror invites acceptance by the doing of an act "it is sometimes impossible for the offeree to express his acceptance otherwise than by performance of his part of the contract" (t). The most obvious example is where a reward is publicly offered to any person, or to the first person, who will recover a lost object, procure certain evidence, or the like. Here the party claiming the reward has not to prove anything more than that he performed the conditions on which the reward was offered, which conditions may or may not include communication by him to the proposer. In the simple case of a reward proposed for something in which the proposer has an obvious interest, there is not likely to be any other question than what the terms were, and whether they have been satisfied by the claimant. But analogous or seemingly analogous cases may be less simple. There may be questions whether the offer was sufficiently certain, or whether it was intended, or could reasonably be taken, as the offer of a contract at all. In England an open letter of credit authorising the addressee to draw on the issuer to a specified extent, and requesting "parties negotiating bills under it to endorse particulars," has been held to amount to a general invitation or request to advance money on the faith of such bills being accepted, and to constitute a contract with any one so advancing money while the credit remained open (u). This is undoubted law, but the same cannot be said of the judgments which have held (in the circumstances, not quite decisively) that when a sale by auction is advertised as without reserve the auctioneer makes a general offer to bidders, which becomes a binding promise to the highest *bonâ fide* bidder, and gives him a right of action "as upon a contract that the sale shall be without

(t) Anson, *Law of Contract*, p. 31, *Ex parte Asiatic Banking Corporation* 14th ed. (1867) L. R. 2 Ch. 391; Finch, Sel. Ca.

(u) *Re Agra and Masterman's Bank*, 40.

reserve" (v); and that a railway company's time-table is a general . 8. 8. proposal to run trains according to the table, which is accepted by an intending passenger tendering the price of a ticket (w). These last-mentioned cases, at any rate, mark the extreme limit of effective proposals of a contract as distinguished from the invitation of proposals by a general statement of the terms on which one is minded to do business. It has been held, on the other hand, that when particular goods are advertised for sale by auction the auctioneer does not contract with any one who attends the sale, intending to purchase those goods, that they shall be actually put up for sale (x); and that an advertisement for tenders for goods to be sold is not a proposal capable of being a contract to sell to the highest bidder, but "a mere attempt to ascertain whether an offer can be obtained within such a margin as the sellers are willing to adopt" (y). In some cases the difficulty of ascertaining the acceptor, if the announcement is treated as a proposal, is enough to dispose of the question. A second-hand bookseller's catalogue is not a series of offers, but only invitation of offers; for if the catalogue had the effect of proposing a sale of every book to the first person who paid or undertook to pay the marked price, the bookseller would be bound to decide at his peril, as between practically simultaneous applicants, whose acceptance was first in order of time, and this might involve obscure matters of both fact and law. Clearly the bookseller does not mean to tie his hands in this way, nor can any reasonable customer suppose that he does. In fact, interpretation must be largely guided, in this class of transactions, by business usage and common sense. Where the acceptance of a proposal consists of the performance of the condition of the proposal, the contract is made at the place where the condition is performed (z).

(v) *Warlow v. Harrison* (1859) 1 E. & E. 309, Ex. Ch.; Finch, Sel. Ca. 16. Two members of the Court preferred to say that the auctioneer was liable as on a warranty that he had authority to sell without reserve. Probably courts of first instance in England are bound to follow this case. See *Johnston v. Boyes* [1899] 2 Ch. 73, 77.

(w) *Denton v. G. N. R. Co.* (1856) 5 E. & B. 860. It was also held that an

action for deceit would lie on the facts. This opinion is not easy to reconcile with later authorities. See Pollock on Torts, 10th ed. 311.

(x) *Harris v. Nickerson* (1873) L. R. 8 Q. B. 286.

(y) *Spencer v. Harding* (1870) L. R. 5 C. P. 561.

(z) *Sitaram Marwari v. Thompson* (1905) 32 Cal. 884.

8. 8. Acting on offer—when sufficient Acceptance.—The nature of the acceptance required in these cases was considered by the English Court of Appeal in *Carlill v. Carbolic Smoke Ball Co. (a)*. The defendant company, being the proprietor of the “carbolic smoke ball,” a device for treating the nostrils and air passages with a kind of carbolic acid snuff, issued an advertisement offering £100 reward to any person who should contract influenza (or similar ailments as mentioned) after having used the ball as directed. It was also stated that £1,000 was deposited with a named bank, “showing our sincerity in the matter.” The plaintiff bought one of the smoke balls by retail, did use it as directed, and caught influenza while she was still using it. Hawkins, J. (b), held in a considered judgment that she was entitled to recover £100 as on a contract by the company. On appeal from this judgment it was held that the defendant company could not be heard to say the offer was not meant seriously; that the terms, though rather vague, were capable of a certain meaning, and at least included the event, which had happened, of the plaintiff taking influenza while still using the remedy; and that, if the offer was unguarded and improvident, that was the defendants’ own folly and no answer to the plaintiff’s claim. There was an offer to any one who performed the condition (namely, of using the smoke ball as directed) on the faith of the advertisement; and by such performance it became a contract, not absolute, but subject to the further independent condition of the user contracting influenza or the like while using the remedy, and perhaps during some reasonable time afterwards. (As to conditional, or, as the Act calls them, contingent contracts in general, see Chap. III., below, ss. 31 sqq.) As to the objection that to complete the plaintiff’s acceptance of the offer there must either be communication to the defendant or some act of a public nature, Bowen, L.J., said (c): “One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. . . . But there is this clear gloss to be made upon that doctrine, that, as notification of acceptance is

(a) [1893] 1 Q. B. 256.

Q. B. 484.

(b) The facts were not disputed. See the report in the Court below, [1892] 2

(c) [1893] 1 Q. B. at p. 269.

required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose that there can be no doubt that where a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification." Cp. s. 7 (2) above.

It was said without hesitation, several years earlier, by a very learned American writer, that "in a unilateral contract"—i.e., where a performance is given for a promise—"an acceptance in terms may be, and commonly is, dispensed with" (d). Earlier still the question had been judicially thrown out: "If a man writes, 'Send me such and such goods, and I will pay for them,' is not the sending of the goods, without more, an acceptance of the offer?" (e). Perhaps it would not be a safe and more elegant way of stating the law to say that a proposal is in every case accepted by performance of its conditions (or perhaps, more accurately, by compliance with its terms); that communication by the acceptor to the proposer or his authorised agent is necessary when the terms consist of or include a counter-promise (for there is no promise at all without communication) (f); but that when only acts are required the communication of their performance may or may not be added as a term of the offer at the will of the proposer, which may be either express or inferred from the nature and circumstances of the proposal. From this

(d) Langdell, Summary of the Law of Contracts, s. 12; cp. Harriman on Contract, § 48, 2nd ed.

(e) Cresswell, J., in *Harvey v. Johnston* (1848) 6 C. B. 295, 304; 77 R. R. 328, 332. The suggestion appears to have escaped the notice of text-writers for many years.

(f) Even the English doctrine (un-

known in India) that a covenant by deed is binding without communication to the covenantee is no real exception. The maker of the deed is bound, not because a promise not communicated can of itself be binding, but because he has solemnly acknowledged himself to be bound.

8. 8. point of view, the present section of the Act would be logically prior to s. 7.

Does an act done by a person in ignorance of the proposal amount to "performance of the conditions of the proposal" within the meaning of this section? According to the High Court of Allahabad it does not. The plaintiff in that case was in the defendant's service as a *munib*. The defendant's nephew absconded, and the plaintiff volunteered his services to search for the missing boy. In his absence the defendant issued hand-bills offering a reward of Rs. 501 to any one who might find out the boy. The plaintiff traced him and claimed the reward. The plaintiff did not know of the hand-bills when he found out the boy. Held that the plaintiff was not entitled to the reward (*g*). The Court declined to follow the English case of *Williams v. Carwardine* (*h*) as an authority that if A. offers a promise for an act, and B. does the act in ignorance of the offer, B. is nevertheless entitled to claim performance of the promise from A. A somewhat peculiar case came up recently before the Judicial Committee (*i*). The plaintiff was a grandniece of Papamma, a wealthy Hindu widow, and was brought up by her from early age. At the age of fourteen the plaintiff was married to an ex-zamindar who owned property of considerable value. Papamma was anxious that the plaintiff, although married, should continue to live with her, and she promised that if the plaintiff and her husband would reside with her, she would make provision for her on a fairly ample scale by the purchase of immoveable property for her. The plaintiff and her husband accordingly lived with Papamma. In 1893 Papamma bought a village in her own name, but, as she stated, for the appellant. Dissatisfaction arose because it was not transferred to the plaintiff, and the husband consequently ceased to reside with Papamma. Papamma sent messages to the husband asking him to return, but he did not return. In October 1893 Papamma wrote a letter in her own hand to the plaintiff herself stating that the

(*g*) *Lalman Shukla v. Gauri Dutt* decision is not received in that sense 1913 11 All. L. J. 489, in England.

(*h*) (1833) 4 B. & A. 621, 38 R. R. (*i*) *Malraju Lakshmi Venkayamma v. Venkata Narasimha Appa Rao* (1916) 328. It is doubtful whether the Court decide; at any rate the L. R. 43 Ind. App. 138; 39 Mad. 509. intended so to

village had been purchased for the appellant and would be transferred to her upon the writer's death. The plaintiff and her husband thereafter resided with Papamma until Papamma's death in 1899. After Papamma's death the plaintiff instituted a suit for a declaration that she was entitled to the village and for possession thereof. Their Lordships held that the letter of October 1893 constituted a promise which was accepted by the plaintiff, and that there was a completed contract which entitled the plaintiff to possession of the village: "The Board is of the opinion accordingly that there has been a completed contract. Papamma accomplished her desire, and she obtained the consideration which she had so much at heart. Acceptance of her terms and compliance with her stipulation were made. The words of Lord St. Leonards in *Maunsell v. Hedges* (j) might be asked here: "Was it not a proposal, with a condition, which being accepted, was equivalent to a contract? Their Lordships do not doubt that it was" (k).

Acceptance by receiving consideration.—The second branch of the section as to "acceptance of any consideration," etc., is rather obscure. It is hard to say with any certainty to what particular class or classes of transactions it relates; nor has anything occurred, so far as is known, to throw light upon it in the generation which has elapsed since the Act was passed. The words seem more appropriate to gifts or transfers of property than to contracts. It is generally sound principle, no doubt, that what is offered on conditions must be taken as it is offered. The use of the word "reciprocal" is curious, for it seems to exclude the most obvious class of cases, as where goods are sent on approval, and the receiver keeps them with the intention of buying them. Here the seller need not and commonly does not offer any promise, and there is therefore no question of a reciprocal promise as defined in the Act (s. 2 (f)). No doubt the acceptance of an offered consideration, *as such*, amounts to giving the promise (whether reciprocal or not) for which it was offered, or else raises an equivalent obligation. But a thing which is offered in one right and for one purpose may be taken under a different claim of right and with a different intent; and in that case (which is

(j) (1854) 4 H. L. C. 1039.

at p. 522.

(k) L. R. 43 I. A., at p. 146: 39 Mad.,

- 1, 9. exceptional but of some importance) the legal result will not be a contract between the parties, whatever else it is capable of being, unless indeed the party receiving the thing so conducts himself as to lead the proposer reasonably to conclude that there is an acceptance according to the offer; and then the proposer can hold him liable on the universal principle that a man's reasonably apparent intent is taken in law to be his real intent. We cannot suppose that the present section is intended to preclude all inquiries of this kind by making every receipt in fact of a thing offered by way of consideration a conclusive acceptance of the proposal.

9.—In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

Express and tacit promises.—This section assumes rather than lays down that which we have already found it needful to mention in the course of the commentary, namely, that both proposals and acceptances may take place without express words. An implied promise, in the sense of the Act, is a real promise, though not conveyed in words. It must be distinguished from the promises frequently said in English books to be implied by law, which were fictions required by the old system of pleading to bring cases of "relations resembling those created by contract" (ss. 68-72, below) within the recognised forms of action, and sometimes to give the plaintiff the choice of a better form of action. Thus, if the plaintiff desired to sue for a liquidated sum in the general form of *assumpsit* instead of in the less convenient form of *debt*, the law conclusively "implied" a promise to pay the debt, though there might not have been any promise in fact. The actual promise "made otherwise than in words" is a matter of fact which in common law practice would be established by the verdict of a jury; whereas in the case of the fictitious promise a jury might have to find the facts on which the law proceeded, but would not have been allowed to find that there was no real promise.

A tacit promise may be implied from a continuing course of conduct as well as from particular acts. Thus an agreement between

Partners to vary the terms of the partnership contract may "either be expressed or be implied from a uniform course of dealing" (s. 252, 305 below, which reproduces well-settled English law). Where parties have acted on the terms of an informal document which has passed between them, but has never been executed as a written agreement or expressly assented to by both, it is a question of fact whether their conduct establishes an implied agreement to be bound by those terms (l).

The language of the section appears to assume that the terms of a contract may be (as undoubtedly they may, by familiar law and practice) partly express and partly implied. A term which, in the opinion of the Court, results from the true construction of the language used by the parties may be said to be implicit in that language, but in the sense of the present section it is not implied; for it is contained in the words of the agreement (m), though not apparent on the face of them. But there is a class of cases, of considerable importance in England, where the parties are presumed to have contracted with tacit reference to some usage well known in the district or in the trade, and whatever is prescribed by that usage becomes an additional term of the contract, if not contrary to the general law or excluded by express agreement. Such terms are certainly implied, as resulting not from the words used, but from a general interpretation of the transaction with reference to the usual understanding of persons entering on like transactions in like circumstances. In India the only cases of this kind which have been reported in the High Courts appear to be on implied contracts to pay interest. Such a contract may exist by reason of mercantile usage (n). The ground on which usages of this kind are enforced is not that they have any intrinsic authority, but that the parties are deemed to have contracted with

(l) *Brogden v. Metropolitan Railway Co.* (1877) 2 App. Ca. 668. This might also be regarded as a case of acceptance by acting on the terms of a proposal.

(m) We say *agreement*, not necessarily *contract*. It often depends on the true construction of an agreement whether it is a contract or not.

(n) In *Juggomohun Ghose v. Manick-*

chund (1859) 7 M. I. A. 263, a new trial was ordered on the ground that the evidence of mercantile usage had not been sufficiently considered. On the new trial the evidence was found insufficient, and on a fresh appeal the Judicial Committee refused to disturb the Judgment: *Juggomohun Ghose v. Kaisreechund* (1862) 9 M. I. A. 200.

9, 10. reference to them. They need not, accordingly, be ancient or universal. It is enough that they are in fact generally observed by persons in the circumstances and condition of the parties.

CHAPTER II.

OF CONTRACTS, VOIDABLE CONTRACTS AND VOID • AGREEMENTS.

10.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

What agree-
ments are con-
tracts.

Nothing herein contained shall affect any law in force in British India, and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.

The first paragraph of this section is developed and applied by the more specific provisions of several following sections, which will be considered as they occur.

As to contracts required to be in writing.—See s. 25, sub-ss. 1 and 3, and s. 28, Exception 2. See also Indian Companies Act VII of 1913, s. 9 as to memorandum of association, s. 19 as to articles of association, and s. 88 as to contracts by companies. In this connection may also be noted the provisions of the Transfer of Property Act which require a writing in the case of a sale (s. 54), of a mortgage (s. 59), lease (s. 107) and gift (s. 123), and the provisions of the Indian Trusts Act which require a trust to be created in writing (s. 5); but those are not cases of contract in the proper sense of the word. Acknowledgments to save the law of limitation are required to be in writing by s. 19 of the Limitation Act XV of 1908. Submissions under the Arbitration Act IX of 1899 are similarly required to be in writing.

Oral and documentary evidence.—The Act does not deal with the kind of proof generally required to establish the facts constituting a contract. In British India the law on that subject is codified in

the Evidence Act I of 1872. See especially ch. VI, of that Act, ss. 91 **Sa. 10**, sqq., as to the exclusion of oral by documentary evidence.

* **Variance between print and writing.**—Print and other mechanical equivalents of handwriting are generally in the same position with regard to rules of evidence and construction. But where a contract is partly printed in a common form and partly written, the words added in writing are entitled, as Lord Ellenborough said in a judgment repeatedly approved (o), if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words; inasmuch as the written words are the immediate language and words selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions. But the print is not to be discarded altogether, and the Court should discover the real contract of the parties from the printed as well as from the written words (p).

As to the law relating to Registration.—S. 17 of the Indian Registration Act XVI of 1908 specifies documents which require to be registered; and s. 49 of the same Act provides that no document required by s. 17 to be registered shall affect any immoveable property, unless it has been registered in accordance with the provisions of that Act.

11.—Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.

This section deals with personal capacity in three distinct branches: (a) disqualification by infancy; (b) disqualification by insanity; (c) other special disqualifications by personal law.

(o) *Robertson v. French* (1803) 4 East, 130; 7 R. R. 538, 540, approved in *H. L., Glynn v. Margeson* [1893] A. C. 351, 357; in *C. A., Standard Marine Insurance Co.* (1889) 22 Q. B. Div. 499, 501; *Noorbhai v. Allabux* (1917) 19 Bom. L. R. 845.
 (p) *Paul Beier v. Chotalal Javerdas* (1906) 30 Bom. 1.

S. 11. **Infancy.**—As to infancy, the terms of the Act (g), as compared with the Common Law, were long a source of grave difficulty. By the common law an infant's contract is generally not void but voidable at his option; if it appears to the Court to be for his benefit, it may be binding, and especially if the contract is for necessities. There was formerly, however, a current opinion, countenanced by the lax forms in which some of the decisions were expressed, that infants' agreements were of three kinds: namely, that some were wholly void as being obviously not for the infant's benefit, some valid as being obviously for his benefit, and all others voidable. This opinion is now quite exploded (r), but it was to be found in text-books at the time when the Indian Contract Act was framed. Still there was never any authority for saying that infants were absolutely incompetent to contract. The literal construction of the present section leads to the conclusion that being of the age of majority according to one's personal law is a necessary element of contractual capacity. Such capacity is not in deed expressly denied to persons who are not of full age, but a reader not acquainted with the rules of English law would naturally suppose that it was excluded by all but necessary implication. Since the Act, as a whole, purports to consolidate the English law of contracts, with only such alteration as local circumstances require, and there is no trace in the report prefixed to the original draft, or any other relative document, of any intention to make a new rule as to the contracts of minors, it is not surprising that the Indian High Courts endeavoured to avoid a construction involving so wide a departure from the law to which they had been accustomed; but the Judicial Committee has now declared that the literal construction is correct, and has suggested that it was intended to give effect to the rule of Hindu law on the subject (s).

We may mention that in England the powers of infants to contract and to ratify their contracts have been much restrained by the Infants' Relief Act of 1874, a statute of good intentions and imperfect workmanship; and the Sale of Goods Act, 1893, s. 2, has declared

(g) They are almost identical with those of the original draft. There is nothing to show that the Commissioners were aware of any difficulty. *Quære* whether they intended to alter the law.

(r) Anson, *Law of Contract*, 14th ed. 135.

(s) *Mohori Bibee v. Dhurmodas Ghose* (1903) 30 Cal. 539; L. R. 30 Ind. Ap. 114.

the liability of infants to pay a reasonable price (*t*) for necessities sold and delivered to them, and has defined necessities according to the latest and best judicial authorities. These enactments, of course, have no authority in India, and can be referred to only for the purpose of illustrating the common law rules. The result of the statutes is to bring the English law much nearer to the Anglo-Indian, for most practical purposes, than it might seem at first sight. We proceed to the details of the Anglo-Indian law. S. 11.

Age of majority.—This is now regulated by the Indian Majority Act IX of 1875. S. 3 of the Act declares that every person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. In the case, however, of a minor of whose person or property or both a guardian has been appointed by a Court, or of whose property the superintendence is assumed by a Court of Wards, before the minor has attained the age of eighteen years, the Act provides that the age of majority shall be deemed to have been attained on the minor completing his age of twenty-one years. S. 2 of the Act declares that nothing in the Act contained shall affect the capacity of any person to act in matters of marriage, dower, divorce, and adoption. An order discharging the guardian of a minor under s. 48 of the Guardians & Wards Act, 1890, does not terminate the minority when it is obtained by fraud practised upon the Court by a third party (*u*).

“Law to which he is subject.”—The age of majority as well as the disqualification from contracting is to be determined by the law to which the contracting party is subject. This provision is applied according to the principle of English law, namely, that the question of the capacity of a person to enter into a contract is decided by the law of his domicile, and not the law governing the substance of the contract. Thus in *Kashiba v. Shripat* (*v*) a Hindu widow above the age of sixteen and under the age of eighteen years, whose husband

(*t*) It need not be the price contracted for. We shall recur to the significance of this point.

(1913) 24 Mad. L. J. 49.

(*v*) (1894) 19 Bom. 697. See also *Rohilkhand and Kumawn Bank, Ltd. v. Row* (1885) 7 All. 490.

(*u*) *Subramaniam v. Doraidinga*

8. 11. had his domicile in British India, executed a bond in Kolhapur (outside British India), where she was then residing. As the widow had not changed her domicile after her husband's death, her domicile was the same as that of her husband at his death, namely, British India. The question arose whether her liability on the bond was to be governed by the law of Kolhapur (*lex loci contractus*), or by the law of British India (law of her domicile). According to the law obtaining in Kolhapur, which is Hindu law unaffected by the Contract Act, she would have been liable on the bond, as the age of majority according to that law is sixteen years (*w*), and the bond was executed by her after she completed her sixteenth year. According to the law in British India, namely, the Contract Act, she was not liable, as the contract was made when she was under the age of eighteen years, and was not ratified by her after she attained her majority. It was held that her capacity to contract was regulated by the contract Act, being the law of her domicile, and that under the Act she was not liable on the bond.

Minor's contract.—If the first branch of the rule laid down in the section be converted into a negative proposition, it reads thus: *No person is competent to contract who is not of the age of majority according to the law to which he is subject; in other words, a minor is not competent to contract.* This proposition is capable of two constructions: either that a minor is absolutely incompetent to contract in which case his agreement is *void*, or that he is incompetent to contract only in the sense that he is not liable on the contract though the other party is, in which case there is a voidable contract. If the agreement is void, the minor can neither sue nor be sued upon it, and the contract is not capable of ratification; if it is voidable, he can sue upon it, though he cannot be sued by the other party, and the contract he ratified by the minor on his attaining majority. The former current of Indian decisions was that, as under the English law, a minor's contract is only voidable at his option (*x*). But in 1903 the point came before the

(*w*) See Mayne's *Hindu Law*, s. 210, 8th ed. (1900).

(*x*) *Sashi Bhusan v. Jadu Nath* (1885) 11 Cal. 552; *Hanmant v. Jayarao* (1888) 13 Bom. 50; *Mahomed Arif v.*

Sareswati (1891) 18 Cal. 259; *contra*, per Norris, J., *Fatima v. Debnauth* (1893) 20 Cal. 508; and see *Kashiba v. Shripat* (1894) 19 Bom. 697 (no decision on the point in either case); *Sadashiv v.*

Judicial Committee in *Mohori Bibee v. Dharmodas Ghose* (y), on the question whether s. 64 of the Act, which deals with the rescission of voidable contracts and the duty of the party rescinding to restore any benefit received, applies to the contracts of infants. Admitting the general current of decision in India to have been in favour of holding such contracts only voidable, their Lordships considered themselves free to act on their own view; and having regard to the terms of ss. 2 and 10, as well as of the present section, they held that "the Act makes it essential that all contracting parties should be competent to contract," and especially provides that a person who by reason of infancy is incompetent to contract cannot make a contract within the meaning of the Act. It was accordingly held in that case that a mortgage made by a minor is void, and a money-lender who has advanced money to a minor on the security of the mortgage is not entitled to repayment of the money under ss. 64 and 65 on a decree being made declaring the mortgage invalid. This decision leaves no doubt that a mortgage by a minor being void, no decree can be passed *on the mortgage* either against the mortgagor personally or against the mortgaged property (z).

Fraudulent Representation.—In *Mohori Bibee's* case cited above, it was contended on behalf of the money-lender that an order should be made for a return of the money advanced by him under s. 41 of the Specific Relief Act I of 1877. As to this part of the case the Judicial Committee said: "Another enactment relied upon as a reason why the mortgage money should be returned is s. 41 of the Specific Relief Act (I of 1877), which is as follows:—'Sec. 41. On adjudging the cancellation of an instrument the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' Sec. 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of first instance, and subsequently the Appellate Court, in the exercise of such discretion,

Trimbak (1898) 23 Bom. 146, the former decision followed with some hesitation. The decision of the Judicial Committee stated in the text makes it useless to give details of these judgments.

(y) (1903) 30 Cal. 539; L. R. 30 Ind.

Ap. 114.

(z) *Saral Chand Mitter v. Mohun Bibi* (1898) 25 Cal. 371, in which a mortgage decree was passed, is no longer good law. See judgment of Jenkins, J., on p. 385 of the report.

S. 11. came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised." (a).

The decision has been regarded by the Indian Courts as an authority that the circumstances of a particular case may be such that having regard to s. 41 of the Specific Relief Act, the Court may, on adjudging the cancellation of an instrument at the instance of a minor, require the minor to make compensation to the other party to the instrument (b). It has accordingly been held that where a mortgage of his property by a minor is set aside by the Court, the Court may make compensation to the lender if the loan was obtained by the minor by fraudulently representing that he was of full age (c). It has similarly been held that where a sale of his property by a minor, which, of course is void under the Privy Council ruling, is set aside by the Court, the Court may, if satisfied that the sale was procured by the minor by a fraudulent misrepresentation as to his age, direct the minor to make compensation to the vendor (d).

It is well established in English law that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto*. "You cannot convert a contract into a tort to enable you to sue an infant" (e). Lately it has been held by the Court of Appeal in *R. Leslie, Ltd. v. Sheill* (f) that where an infant obtains a loan by falsely representing his age, he cannot be made to pay the amount of the loan as damages for fraud, nor can he be compelled in equity to repay the money. As to the extent to which the aid of equity can be invoked in cases of fraudulent misrepresentation as to age Lord Sumner said: "I think the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to show

(a) (1903) L. R. 30 Ind. App. at p. 125, 30 Cal. at p. 549.

(b) See *Dattaram v. Vinayak* (1903) 28 Bom. 181, at p. 190.

(c) *Kamta Prasad v. Sheo Gopal Lal* (1904) 26 All. 342; *Indar Singh v. Narindar Singh* (1904) Punj. Rec. No. 33; *Vaikuntaram v. Authimoolam* (1915) 38 Mad. 1071.

(d) *Jagar Nath Singh v. Lalla Prasad* (1908) 31 All. 21; *Shiam Lal v. Ram Piari* (1909) 32 All. 25; *Balak Ram v. Dadu* (1910) Punj. Rec. No. 76.

(e) *Jennings v. Rundall* (1799) 8 T. R. 335, 4 R. R. 680.

(f) [1914] 3 K. B. 607.

that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of a fraud . . . Restitution stopped where repayment began" (g). His Lordship then proceeded: "The money was paid over in order to be used as the defendant's own, and he has so used it and spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word, nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so (h). In *Leslie v. Sheill*, the loan was not secured by a mortgage. The principle of that decision was applied by the Judicial Committee to a case from the Straits Settlements where the loan was secured by a mortgage of the minor's property (i).

Estoppel.—If a minor procures a loan or enters into any other agreement by representing that he is of full age, is he estopped by s. 115 of the Indian Evidence Act 1 of 1872 (j) from setting up that he was a minor when he executed the mortgage? The point was raised, but not decided, in *Mohori Bibee's case* (k). In that case the Judicial Committee said: "The Courts below seem to have decided that this section does not apply to infants; but their Lordships do not think it necessary to deal with that question now. They consider it clear that the section does not apply to a case like the present, where the statement relied upon is made to a person who knows the real facts

(g) [1914] 3 K. B. at p. 618.

(h) [1914] 3 K. B. at p. 619.

(i) *Mahomed Syedol Ariffin v. Yesh Ooi Gark* (1916) 43 I. A. 256, pp. 263-64, 21 C. W. N. 257. See *Radha Shyam v. Behari Lal* (1918) 40 All. 558, 559-560.

(j) "When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true, and to act

upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

(k) (1903) 30 I. A. 114, 122, 30 Cal. 539, 545, referred to by Sumner, L. J., in his judgment in *R. Leslie, Ltd. v. Sheill* [1914] 3 K. B. 607, at p. 615.

8. 11. and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both parties, and their Lordships hold, in accordance with English authorities, that a false representation, made to a person who knows it to be false, is not such a fraud as to take away the privilege of infancy". There is a conflict of judicial opinion in India. The High Court of Bombay has held that the section applies to minors, and that a sale of his property by a minor who had represented that he was of full age is binding on him (l). Similarly where a minor shareholder in a company continued to receive dividends on his shares after attaining majority, it was held that he was estopped by his conduct from denying as between himself and the liquidator of the company that he was a shareholder (m). The course of decisions in Calcutta seems to be the other way. In *Mohori Bibee's* case, the view taken both by the Court of first instance and the Appellate Court seems to be that the section does not apply to minors (n). The same view was taken in a recent case (o) where the Court said: "It is unnecessary to consider whether a minor can be estopped in any case, but we think that the law of estoppel must be read subject to other laws such as the Indian Contract Act, and that a minor cannot be made liable upon a contract by means of an estoppel under s. 115 of the Indian Evidence Act, when some other law (the Contract Act) expressly provides that he cannot be made liable in respect of the contract In *Surendra Nath Roy v. Krishna Sakhi Dasi* (p), it was held that if there was misrepresentation by a minor operating to deceive, and if the vendors were deceived by it, the minor would be bound by the transaction. In this case, as we have already stated, the Court found that there was no fraudulent representation on the part of the minor". The High Court of Allahabad has recently held that a minor who procures a loan by falsely representing that he is of full age is not estopped from pleading his minority in a suit

(l) *Ganesh Lal v. Bapu* (1895) 21 Bom. 198; *Dadasaheb v. Bai Nahani* (1917) 41 Bom. 480. In both these cases the misrepresentation was fraudulent.

(m) *Fazulbhoj v. Credit Bank* (1914) 39 Bom. 331. In this case there was no fraud.

(n) *Dharmo Dass Ghose v. Brahmo Dutt* (1898) 25 Cal. 616, 622; *Brahmo Dutt v. Dharmo Das Ghose* (1898) 26 Cal. 381, 388, 394.

(o) *Golam Abidin v. Hem Chandra* (1916) 20 C. W. N. 418.

(p) (1910) 15 C. W. N. 239.

upon a promissory note passed by him (g). In a recent Madras case (r) Sadasivva Ayyar, J., took the same view as the Allahabad High Court. Wallis, J., said that "*in the absence of fraud* an infant is not estopped from pleading minority". It is difficult to understand how, if s. 115 applies to the case of minors, any distinction can be drawn between innocent and fraudulent misrepresentation. S. 115 of the Evidence Act is no more than a rule of evidence, and it is, indeed, curious that what is merely a rule of evidence should be so construed as to nullify the express provisions of substantive law contained in s. 11 of the Contract Act. We are inclined to think that s. 115 does not apply to minors, and we put it on the broad ground that in a body of codified law, no one enactment should be so construed as to render the express provisions of another enactment absolutely nugatory. In England the Infant's Relief Act, 1874, would be a complete answer to the plea of estoppel as regards contracts declared to be void by that Act (s). No doubt, the rule of estoppel in England forms part of the unwritten law, but that should not make any difference on principle.

Mortgages and sales in favour of minors.—Section 7 of the Transfer of Property Act, 1882, provides that every person competent to contract and entitled to transferable property is competent to transfer such property. But it is not provided anywhere in the Act that a person not competent to contract is incapable of being a transferee of property. It has accordingly been held that though a sale or mortgage of his property by a minor is void (t), a duly executed transfer by way of sale (u) or mortgage (v) in favour

(g) *Kanhai Lal v. Babu Ram* (1911) 8 All. L. J. 1058; *Kanhaya Lal v. Girdhari Lal* (1912) 9 All. L. J. 103. See also *Jagar Nath v. Lalla Prasad* (1908) 31 All. 21, 26, 34.

(r) *Vaikuntarama v. Authimoolam* (1915) 38 Mad. 1071.

(s) *R. Leslie, Ltd. v. Sheill* [1914] 3 K. B. 607, 616.

(t) *Mohori Bibee v. Dhurmodas Those* (1903) 30 I. A. 114, 123, 30 Cal. 339, 547.

(u) *Ujjal Rai v. Gauri Shankar*

(1911) 33 All. 657; *Narain Das v. Musammat Dhania* (1916) 38 All. 154; *Munni Koer v. Madan Gopal* (1916) 38 All. 62; *Munia v. Perumal* (1911) 37 Mad. 390. See also *Maghan Duba v. Pran Singh* (1908) 30 All. 63 [purchase by a joint Hindu family in the name of a minor member].

(v) *Raghava Chariar v. Srinivasa* (1917) 40 Mad. 308 (F. B.), overruling *Navakotti v. Lagalinga* (1910) 33 Mad. 312.

- 8.11. of a minor who has paid the consideration money is not void, and it is enforceable by him or any other person on his behalf. A minor, therefore, in whose favour a deed of sale is executed is competent to sue for possession of the property conveyed thereby (w). Similarly where property is conveyed to a minor, and the latter is subsequently ousted on suit by third parties, he is entitled to recover from the vendor the sum which he had paid as purchase money (x). And it has been recently held by a Full Bench of the Madras High Court that a mortgage executed in favour of a minor who has advanced the mortgage money is enforceable by him or by any other person on his behalf (y). The High Court of Madras had held, on the analogy of the above cases, that a promissory note executed in favour of a minor is not void and can be sued upon by him (z).

Ratification.—As it is now finally settled that a minor's agreement is void, it follows that there can be no question of ratifying it. Upon the same principle a promissory note, given by a person on attaining majority in settlement of an earlier one signed by him while a minor in consideration of money then received from the obligee cannot be enforced in law. Such a note, it has been held by the Madras High Court, is void for want of consideration (a). In a recent Calcutta case (b) a bond was executed by S., after attaining majority, promising to pay within a year Rs. 7,000, being the price of piece goods sold to him during his minority, and also to repay Rs. 76 advanced to him for necessities. The obligee sued S. on the bond, and it was held that S. was liable. The Court said: "Here the contract on which the suit is brought is by a defendant of full age, it is a new contract, by it the plaintiff has debarred

(w) 33 All. 657, *supra*; 38 All. 62, *supra*; 37 Mad. 390, *supra*; 38 All. 154, *supra*.

(x) *Walidad Khan v. Janak Singh* (1913) 35 All. 370.

(y) *Raghava Chariar v. Srinivasa* (1917) 40 Mad. 308; *Hari Mohan v. Mohini Mohan* (1917) 22 Cal. W. N. 130.

(z) *Rangarazu v. Maddura* (1913) 24 Mad. L. J. 363.

(a) *Indrau Ramaswami v. Anthappa*

Chettiar (1906) 16 Mad. L. J. 224; *Arumugam v. Duraisinga* (1914) 37 Mad. 38. See also *Chuah Hooi Guoh Neoh v. Khaw Sim Bee* (1915) 19 C. W. N. 788 (re-opening settlement of property made during plaintiff's infancy).

(b) *Kundan Bibi v. Sree Narayan* (1906) 11 C. W. N. 135, followed in *Karm Chand v. Basant Kuar* (1911) Punj. Rec. no. 31.

himself from suing until the expiration of one year after the date of the contract for moneys which are alleged to be due at the date of the contract, and she has made an advance of Rs. 76. There was thereupon a *new* consideration for the promise on which the defendant is sued, and in my opinion, in the absence of any statutory provision such as that to be found in England in s. 2 of the Infants' Relief Act, 1874, he is liable." The only difference between this and the Madras case, so far as the note sued upon goes, is that in the latter case there was a promissory note passed during minority, and the note was *renewed* by the defendant on attaining majority, while in the Calcutta case there was no bond passed during minority, but the bond was executed for the first time after attaining majority. This circumstance, however, cannot make any difference in principle, nor is there anything in the judgment in the Calcutta case to show that the decision proceeded upon any such difference. The ground of the decision was that there was a *new* consideration for the promise on which the defendant was sued. We fail to see how either the forbearance to sue or the advance for necessities could be regarded as a new consideration, and we are of opinion that the decree so far as it awarded to the plaintiff the price of the goods sold was erroneous in law. In England it is not clear that money advanced to a minor for the purchase of necessities and actually expended thereon may not be recovered as having been itself a necessary. See notes to s. 25, cl. (2).

Specific Performance.—A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the Judicial Committee. It is, however, different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Judicial Committee, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and further, if it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced.

S. 11.

at all (c). Thus it has been held that a contract entered into by a certificated guardian of a minor with the sanction of the Court for the sale of property belonging to the minor, the contract being for the minor's benefit, may be enforced by either party to the contract (d). But a guardian of a minor has no power to bind the minor by a contract for the purchase of immoveable property, and the minor therefore is not entitled to specific performance of the contract. It has been so held by the Judicial Committee in the recent case of *Mir Sarwarjan v. Fakharuddin Mahomed* (e). In the course of the judgment their Lordships said: "They are, however, of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract." Referring to the above ruling of the Judicial Committee, the Allahabad High Court observed in a recent case that it does not apply to guardians appointed by Statute, such as the Guardians and Wards Act, 1890, or the various Court of Wards Acts, and that it was competent to such guardians to enter into a contract for the purchase of immoveable property on behalf of the minor with the sanction of the Court (f).

Necessaries.—S. 68 provides for liability in respect of necessities supplied to a person *incapable of entering into a contract*. A minor is a person incapable of contracting within the meaning of that section (g), and, therefore, the provisions of that section apply to his case. It will be observed that the minor's property is liable for necessities, and no personal liability is incurred by him, as it may be under English law. S. 70 cannot be read so as to create any personal

(c) *Etwaria v. Chandra Nath* (1906) 10 C. W. N. 763; *Babu Ram v. Said-un-Nissa* (1913) 35 All. 499 (a case of damages). *Chhital Mal v. Jagan Nath Prasad* (1907) 29 All. 213.

(d) 10 C. W. N. 763, *supra*; 35 All. 499, *supra*; *Innatunnessa v. Janaki Nath* (1917) 22 Cal. W. N. 477.

(e) (1912) 39 Cal. 232, 39 I. A. 1, reversing (1906) 34 Cal. 163.

(f) *Babu Ram v. Said-un-Nissa* (1913) 35 All. 499 at p. 501 [this was a case of sale of minor's property].

(g) *Watkins v. Dhunmoo Baboo* (1881) 7 Cal. 140, 143; *Mohori Bibee v. Dhurmodas Ghose*, note (f), p. 73, above.

liability in such a case. Under English law the liability is not on the express promise, if any there be; the obligation is *quasi ex contractu* to pay a reasonable price for necessary goods supplied: Sale of Goods Act, 1893, s. 2. It would probably be held that this only declares the common law (h), and, therefore, that the rule is the same as to necessities other than goods. Necessaries must be things which the minor actually needs; therefore it is not enough that they be of a kind which a person of his condition may reasonably want for ordinary use; they will not be necessary if he is already sufficiently supplied with things of that kind, and it is immaterial whether the other party knows this or not (i). It may be presumed that Anglo-Indian Courts would follow the English decisions on this point, which does not appear to be precisely covered by the language of s. 68. Objects of mere luxury cannot be necessities, nor can objects which, though of real use, are excessively costly. The fact that buttons are a normal part of many usual kinds of clothing, for example, will not make pearl or diamond buttons necessities (j). See notes to s. 68, below.

Bond jointly passed by a minor and an adult.—A and B jointly pass a bond to C. A is a minor at the date of the bond. B is liable on the bond, though A may not be liable (l).

"Of sound mind."—See s. 12 for the definition of soundness of mind. By English law a lunatic's contract is not void, but voidable at his option, and this only if the other party had notice of his insanity at the time of making the contract (l). But, after the decision that this section makes a minor's agreement wholly void, it is clear that a person of unsound mind must in British India be held absolutely

(h) See *Nash v. Inman* [1908] 2 K. B. 1, C. A., especially the judgment of Fletcher Moulton, L. J.

(i) *Johnstone v. Marks* (1887) 19 Q. B. D. 509, followed in *Jagon Ram v. Mahadeo Prasad* (1909) 36 Cal. 768. Previous English decisions were conflicting, but the point may now be taken as settled. *Cp.* the Sale of Goods Act, 1893, s. 2.

(j) The classical English authority is *Ryder v. Wombwell* (1868) L. R. 4 Ex. 32. The minuteness of the English cases

on this point seems due, as matter of fact, to the general bias of juries in favour of tradesman, and their opinion that it is shabby to plead infancy.

(k) *Jamma Bai v. Vasant Rao* (1916) L. R. 43 I. A. 99, at p. 103; 39 Mad. 400. See also *Rup Chand v. Fazal Ilahi* (1917) Punj Rec., no. 40, p. 156 [lease to a minor and an adult in equal shares].

(l) *Imperial Loan Co. v. Stone* (1892) 1 Q. B. 599, C. A., confirming previous authorities.

11. incompetent to contract. And it has in fact been held to be so in a recent Madras case (*m*). The supply of necessities to lunatics, among other persons "incapable of entering into a contract," is dealt with by s. 68 of the Act; see the illustrations.

Persons otherwise "disqualified from contracting."—The capacity of a woman to contract is not affected by her marriage either under the Hindu or Mahomedan law. A Hindu female is not, on account of her sex, absolutely disqualified from entering into a contract; and marriage, whatever other effect it may have, does not take away or destroy any capacity possessed by her in that respect. It is not necessary to the validity of the contract that her husband should have consented to it. When she enters into a contract with the consent or authority of her husband, she acts as his agent, and binds him by her act; and she may bind him by her contract, in certain circumstances (*n*), even without his authority, the law empowering her on the ground of necessity to pledge her husband's credit. Otherwise a married woman cannot bind her husband without his authority, but she is then liable on the contract to the extent of her *stridhanam* (separate property) (*o*). Similarly, a married Hindu woman may contract jointly with her husband but then she is liable to the extent of her *stridhanam* only (*p*). In the same way a married Mahomedan woman is not by reason of her marriage disqualified from entering into a contract.

Turning next to persons of other denominations, there are two Indian enactments that create the separate property of married woman, and impliedly confer upon them, as an incident of such property, the capacity to contract in respect thereof. The one is the Indian Succession Act X of 1865, s. 4, and the other the Married Women's Property Act III of 1874. Both these enactments apply to the whole of British India, but neither of them applies to any marriage one or both of the parties to which professed, at the time of the marriage, the Hindu, Mahomedan, Buddhist, Sikh, or Jaina religion (*q*). S. 4

(*m*) *Machaima v. Usman Beari* (1907) 17 Mad. L. J. 78; see also *Kamola Ram v. Kaura Khan* (1912) Punj. Rec. no. 41.

(*n*) *E.g.*, pressing necessity: *Pusi v. Mahadeo Prasad* (1880) 3 All. 122, at p. 124.

(*o*) *Per Cur.* in *Nathhubai v. Javher* (1876) 1 Bom. 121.

(*p*) *Govindji v. Lakmidas* (1879) 4 Bom. 318; *Narotam v. Nanka* (1882) 6 Bom. 473.

(*q*) See Act III of 1874, s. 2, and Act X of 1865, s. 331.

of the Succession Act provides that no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried. The effect of this was that on or after January 1st, 1866 (*r*), all women married to whose marriages the Act applied became absolute owner of all property vested in, or acquired by, them, and their husbands did not by their marriage acquire any interest in such property (*s*). It was subsequently considered expedient to make due provision for the enjoyment of wages and earnings by women married before 1866 (*s*), and the Married Women's Property Act enacted that the wages and earnings of any married woman acquired or gained by her after the passing of that Act in any employment, occupation, or trade carried on by her, and all money or other property acquired by her through the exercise of any literary, artistic, or scientific skill, should be deemed to be her separate property (*s*. 4). The Act also provides that a married woman may sue and may be sued in her own name in respect of her separate property (*s*. 7), and that a person entering into a contract with her with reference to such property may sue her, and to the extent of her separate property recover against her, as if she were unmarried (*s*. 8).

Certain classes of persons may be disqualified under certain enactments from entering into contracts in respect of matters specified in those enactments. Thus where a person in Oudh is declared a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act, 1876, he is not competent to alienate his property, and the same incapacity extends to contracts entered into by him, though they relate to property situate outside the province of Oudh (*t*).

The disability of alien enemies to sue in our Courts without licence is a matter of general public policy not coming under this head.

12.—A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

What is a sound mind for the purposes of contracting.

(*r*) Act X of 1865, s. 331.

(*s*) See the preamble to Act III of 1874.

(*t*) *Lachnis Narnain v. Fateh Bahadur Singh* (1902) 25 All. 195, 202.

8. 12. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

• *Illustrations.*

(a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(b) A sane man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Burden of proof.—The difficulty of understanding what is really the effect of this section, in conjunction with s. 11, has already been pointed out. The presence or absence of the capacity mentioned in this section at the time of making the contract is in all cases a question of fact. Where a person is usually of unsound mind, the burden of proving that at the time of the contract he was of sound mind lies on the person who affirms it. In cases, however, of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it existed at the time of the contract. Questions of undue influence and of incapacity by reason of unsoundness of mind must not be mixed up, involving as they do totally different issues (*u*).

Contract in lucid interval.—The second paragraph of the section provides that a person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. Thus even a patient in a lunatic asylum may contract during lucid intervals (see illustration (a)). The question may arise whether a lunatic adjudged to be so under the Lunacy Act, 1912, and of whose property a committee or manager is appointed, can contract during intervals of sound mind. In England, a lunatic not so found, or before he is so found, by inquisition is not by reason of that fact absolute-

(u) *Sayad Muhammad v. Fatteh Singh v. Mirza Muhammad Ali Beg Muhammad* (1894) L. R. 22 Ind. Ap., (1904) L. R. 31 Ind. Ap. 235.
pp. 4, 10; 22 Cal. 324; *Durga Bakhsh*

ly incapable of contracting, though the burden of proof in such a case is on the party maintaining that he is not insane, or that the contract was made during a lucid interval (v); and the same would appear to be the law in India. Where, however, a committee or a manager of the estate of a lunatic adjudged to be so is appointed under either of the Indian Acts no contract can be entered into by a lunatic in respect of his estate even though at the time of the contract he may be in a lucid interval. Similarly it is now settled in England that a person found lunatic by inquisition is incapable of dealing with his property *inter vivos* while the inquisition is in force (w).

13.—Two or more persons are said to consent when they agree upon the same thing in the same sense.

“Consent”
defined.

Apparent and real consent.—The language of this section is, on the face of it, more of a judicial or expository than of a legislative kind. As an authoritative definition it does not seem to define very much. It would need some courage to maintain that persons can be said to consent when they do not agree upon the same thing, or that if they do not agree in the same sense they can be said to agree in any sense at all.

If the section is to cover all kinds of contracts, as presumably it does, the word “thing” must obviously be taken as widely as possible, though it seems most appropriate where the contract has to do with corporeal property. We must understand by “the same thing” the whole content of the agreement, whether it consists, wholly or in part, of delivery of material objects, or payment, or other executed acts or promises. The phrase comes originally from the New York Civil Code, but it has, at all events, high judicial sanction, and the passage in which it was used by the late Lord Hannen, in the year before this Act was passed, is perhaps the best commentary on the general significance of the present section:—

“It is essential to the creation of a contract that both parties should agree to the same thing in the same sense. Thus if two persons

(v) *Hall v. Warren* (1805) 9 Ves. 605; 7 R. R. 306, to which *Snook v. Watts* (1848) 11 Beav. 105, adds nothing material.

(w) *Re Walker* [1905] 1 Ch. 160, C. A. Of a will it is otherwise for the reason explained *ib.* at p. 172.

3. 13. enter into an apparent contract concerning a particular person or ship, and it turns out that each of them, misled by a similarity of name, had a different person or ship in his mind, no contract would exist between them: *Raffles v. Wichelhaus* (x).

"But one of the parties to an apparent contract may, by his own fault, be precluded from setting up that he had entered into it in a different sense to that in which it was understood by the other party. Thus in the case of a sale by sample where the vendor, by mistake, exhibited a wrong sample, it was held that the contract was not voided by this error of the vendor: *Scott v. Littledale* (y).

"But if in the last mentioned case the purchaser, in the course of the negotiations preliminary to the contract, has discovered that the vendor was under a misapprehension as to the sample he was offering, the vendor would have been entitled to show that he had not intended to enter into the contract by which the purchaser sought to bind him. The rule of law applicable to such a case is a corollary from the rule of morality which Mr. Pollock (z) cited from Paley (a), that a promise is to be performed 'in that sense in which the promisor apprehended at the time the promisee received it,' and may he thus expressed: 'The promisor is not bound to fulfil a promise in a sense in which the promisee knew at the time the promisor did not intend it.' And in considering the question in what sense a promisee is entitled to enforce a promise it matters not in what way the knowledge of the meaning in which the promisor made it is brought to the mind of the promisee, whether by express words, or by conduct, or previous

(x) 2 H. & C. 906; 133 R. R. 853; This is a very peculiar case of an equivocal term understood in different senses by the parties. There were two ships of the same name sailing at different times. The decision was on the pleadings, so that the questions of fact which might arise in the proof of such a defence were not and could not be considered.

(y) 8 E. & B. 815 (Note that the sale was of a specific cargo, and the seller misled the buyer, though innocently. If any one was entitled to set aside the contract, it was the buyer.)

(z) Charles Pollock, then Q. C., after-

wards a Baron of the Court of Exchequer and a member of the Exchequer and Queen's Bench Divisions of the High Court of Justice (died 1897).

(a) Moral and Political Philosophy, Book III. Chap. V. Paley's rule, however, is not quite correct. The true test is not what either promisor or promisee actually thought, but the sense in which the promise would reasonably be understood by the promisee: Whateley's note to Paley, l.c., and per Blackburn, J., in *Fowkes v. Manchester and London Assurance Association* (1863) 3 B. & S. 917, 929; cp. L. Q. R. xxi. 219.

dealings, or other circumstances. If by any means he knows that there was no real agreement between him and the promisor, he is not entitled to insist that the promise shall be fulfilled in a sense to which the mind of the promisor did not assent" (b). S. 15

Students and young practitioners must be warned not to exaggerate the working importance of cases which are quoted and discussed for the very reason that they are exceptional. Generally parties who have concurred in purporting to express a common intention by certain words cannot be heard to deny that what they did intend was the reasonable effect of those words; and that effect must be determined, if necessary, by the Court, according to the settled rules of interpretation. Whoever becomes a party to a written contract "agrees to be bound, in case of dispute, by the interpretation which a Court of law may put upon the language of the instrument," whatever meaning he may attach to it in his own mind (c). Exceptions to this rule exist, but they are admitted only for special and carefully limited reasons.

Warning is also still needed, having regard to the language current in all but the most modern text-books, against the habit of using the word "mistake" as if it denoted any general legal principle, or was capable, taken alone, of explaining any departure from the normal grounds of decision (d).

Ambiguity.—Sometimes an apparent agreement can be avoided by showing that some term (such as a name applying equally to two different ships) is ambiguous, and there has been a misunderstanding without fault on either side. Such cases, however, are in fact extremely rare. It usually turns out either that the terms have an ascertained sense by which both parties are bound, and there is a contract which neither can dispute, whatever either of them may profess to have thought, or that, when the facts are established there was really never a proposal accepted according to its terms, and therefore the conditions of a binding contract were not satisfied. Many of the cases cited in the books under the head of mistake belong

(b) Per Hannen, J., *Smith v. Hughes* (1871) L. R. 6 Q. B. p. 609. *ject* (Law of Contract, Chap. IV. s. 1) should be carefully read by all students.

(c) Per Lord Watson, *Stewart v. Kennedy* (1890) 15 App. Ca. 108, 123. They are the most concise exposition to be found in English books of repute,

(d) Sir W. Anson's pages on this sub- and one of the most accurate.

3. 13. to the latter class, as where a broker employed to sell goods delivered to the intending vendor and the intending purchaser two sale-notes describing goods of different qualities (e). "The contract," said the Court, "must be on the one side to sell, and on the other side to accept, one and the same thing." No such contract being shown on the face of the transaction, there was no need to say, and the Court did not say, anything about mistake. In a later case the defendant wanted to order three rifles by telegraph, and a blunder in transmitting the message turned *three* into *the*, which the plaintiff naturally took as referring to the number of *fifty* mentioned in a previous letter. Here it was held that the telegraph clerk had no authority to send the message except as it was delivered to him, so that the message as communicated to the plaintiff was not the defendant's offer at all (f). This, again, has really nothing to do with mistake in point of law. It was immaterial whether the wrong message was sent by the clerk's mistake, or by fraudulent alteration, or through some external accident, such as a thunderstorm, affecting the instruments. Similarly if the addressee of a cipher or code message conveying a proposal misreads the proposal not unreasonably, and accepts it according to his own understanding, he cannot be held bound to the contract which the proposer intended. If the terms are really ambiguous there is nothing in such a case, which either party can enforce (g).

Fundamental error.—In certain classes of cases there may be all the usual external evidence of consent, but the apparent consent may have been given under a mistake, which the party is not precluded from showing, and which is so complete as to prevent the formation of any real agreement "upon the same thing." Such fundamental error may relate to the nature of the transaction, to the person dealt with, or to the subject-matter of the agreement.

As to the nature of the transaction.—A man who has put his name to an instrument of one kind understanding it to be an instrument of a wholly different kind may be entitled, not only to set it aside against the other party on the ground of any fraud or

(e) *Thornton v. Kempster* (1814) 5 Taunt. 786; 15 R. R. 658.

(f) *Henkel v. Pape* (1870) L. R. 6 Ex. 7.

(g) *Falck v. Williams* [1900] A. C. 176, a decision of the Judicial Committee on very peculiar facts.

misrepresentation which caused his error, but to treat it as an absolute nullity, under which no right can be acquired against him by any one. In a modern case the defendant had purported to endorse a bill of exchange which he was told was a guaranty. The plaintiff was a subsequent holder for value, and therefore the fact that the defendant's signature was obtained by fraud would not have protected him in this action. But the Court held that his signature, not being intended as an endorsement of a bill of exchange, or as a signature to any negotiable instrument at all, was wholly inoperative, as much so as if the signature had been written on a blank piece of paper first, and a bill or note written on the other side afterwards (*h*). There are much older authorities showing that if a deed is falsely read over to an illiterate man, and he executes the deed relying on the false reading as being the true substance of the transaction, his act is wholly void (*i*). S. 11

We may expect to find fraud as an element in cases of this class. But it is not the decisive element. A signature attached to a document supposed to be of a wholly different kind, or not to contain a clause so important as substantially to alter its character, is invalid unless the signer is estopped by negligence from denying that he understood what he was signing, and this "not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signor did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended" (*j*). Neither is fraud a necessary element. The principle was applied by the High Court of Bombay, while this Act was still recent, to a case (*k*) where, in very peculiar circumstances, there was a misrepresentation by inadvertence, but no question of fraud. There the plaintiffs, who were creditors of the defendants, sued to have the signature of their agent to a com-

(*h*) *Foster v. Mackinnon* (1869) L. R. 4 C. P. 704. *berland Banking Co. v. Bragg* [1911] 1 K. B. 489, both in C. A. The latter

(*i*) *Thoroughgood's Case*, 2 Co. Rep. 9 b, and other books cited in *Foster v. Mackinnon* (to be used with some caution at this day). For recent authority

it may suffice to refer to *Howatson v. Webb* [1908] 1 Ch. 1, and, taking a

rather different line, *Carlisle and Cumberland Banking Co. v. Fleming* (1879) 3 Bom. 242.

(*j*) *Foster v. Mackinnon*, L. R. 4 C. P. at p. 711.

(*k*) *Oriental Bank Corporation v. Fleming* (1879) 3 Bom. 242.

- l. 18. position deed cancelled, and to have it declared that the deed was not binding on the plaintiffs. The deed was signed under these circumstances: the defendants' firm had suspended payment, and at a creditors' meeting it was resolved that the business of the defendants' firm should be wound up by voluntary liquidation under the supervision of a committee. This resolution was confirmed at a subsequent meeting, and it was further resolved that a composition deed should be prepared in pursuance of the above resolutions. No mention was made at either of the meetings of any release of the claims of the creditors. After a few days a deed was tendered by one of the defendants' firm to the plaintiffs' agent for execution. He was then engaged with urgent English mail business, and he declined to sign it without being able to read it. The debtor then earnestly pressed him to execute the document at once, stating that it was of the utmost importance that no time should be lost, and adding that the deed was nothing more than an assignment to trustees for the benefit of creditors as agreed to at the creditors' meeting. Upon the faith of that assurance the plaintiffs' agent executed the deed. As a matter of fact the deed contained a release by the creditors to the debtors. As soon as the plaintiffs' agent came to know of this he repudiated his signature and refused to be bound by the deed. On behalf of the plaintiffs it was contended that the deed, so far as it operated as a release, was a different deed from that which the plaintiffs' agent intended to execute or thought he was executing, and that his signature could not therefore be held to be a consent to its contents. This argument was upheld, and it was declared that the deed was not the deed of the plaintiffs so far as it purported to operate as a release to the debtors. The Court proceeded further to hold that the transaction was brought about by misrepresentation within the meaning of s. 18, cl. 2 (which see below). It is difficult to see why sub-s. 2 was more in point than sub-s. 1; but in any case it would seem that, having found that the supposed contract was void because there was no contract at all, the Court had no need to consider whether or not the consent, if any, was free within the meaning of s. 14 (1). In a Calcutta case, where a document

(1) It will be seen in this case that transaction was caused by the misrepresentation of the other contracting party.

was signed only on the first page, but was not signed on the other pages, the executant having discovered that it was not in accordance with the terms previously agreed upon, it was held that the document was a nullity (m). S. 18

Consent and estoppel.—The Indian Courts have followed English authority in holding that, in normal circumstances, a man is not allowed to deny that he consented to that which he has in fact done, or enabled to be done with his apparent authority. Thus when a person entrusts to his own man of business a blank paper duly stamped as a bond and signed and sealed by himself in order that the instrument may be drawn up and money raised upon it for his benefit, if the instrument is afterwards duly drawn up and money obtained upon it from persons who have no reason to doubt the good faith of the transaction, it is presumed that the bond was drawn in accordance with the obligor's wishes and instructions (n). As to inchoate stamped negotiable instruments provision is made by the Negotiable Instruments Act XXVI of 1881, s. 20, which is as follows :—"When one person signs and delivers to another a paper stamped in accordance with the law relating to negotiable instruments then in force in British India, and either wholly blank or having written thereon an incomplete negotiable instrument, he thereby gives *prima facie* authority to the holder thereof to make or complete, as the case may be, upon it a negotiable instrument for any amount specified therein and not exceeding the amount conveyed by the stamp. The person so signing shall be liable upon such instruments, in the capacity in which he signed the same, to any holder in due course for such amount, provided that no person other than a holder in due course shall recover from

Sir W. R. Anson suggests (Principles of the Law of Contract, p. 164) that in such a case the contract is only voidable for misrepresentation, and that it is void on the ground of mistake only if the mistake is brought about by the act of a third party. This view is not supported by any English authority, and is contrary to *Oriental Bank Corporation v. Fleming*. The element of truth in it is that A., who has misled B., how-

ever innocently, is estopped from disputing the validity of the contract as against B., if it turns out to be B.'s interest to affirm it. But still the transaction is void in the sense that even innocent third persons cannot acquire rights under it against B.'s will.

(m) *Banku Behari Shaha v. Krishno Gokindo* (1903) 30 Cal. 433.

(n) *Wahidunnessa v. Surgadass* (1879) 5 Cal. 39.

8. 13. the person delivering the instrument anything in excess of the amount intended by him to be paid thereunder." As to the existence or non-existence of apparent authority in particular circumstances very delicate questions may arise under the law and practice of English company business. It would not be useful to pursue these here (o).

Parda-nishin cases.—It might be possible to refer to this head some of the cases in which the gifts or other acts, practically amounting to acts of bounty, of *parda-nishin* (p) women have been set aside. But it is certainly not necessary for this purpose to show that the nature of the act was not understood at all. The jurisdiction rests on a presumption of imperfect knowledge of the world and exposure to undue influence, making it the duty of a person taking a beneficial grant or contract from a *parda-nishin* woman to show that the deed was explained to her and understood by her (q), so that the ordinary burden of proof is reversed. These cases accordingly belong to the head of undue influence.

Error as to the person of the other party.—There can be no real formation of an agreement by proposal and acceptance unless a proposal is accepted by the person, or one of a class or number of persons, to whom it is made. Similarly the acceptance must be directed to the proposer, or at least the acceptor must have so acted as to entitle the proposer to treat the acceptance as meant for him. The acceptance of an offer not directed to the acceptor may occur by accident, as where a man's successor in business receives an order addressed to his predecessor by a customer who does not know of the change, and executes it without explaining the facts. Here no contract is formed (r). But the buyer would be bound, as on a new contract, if after notice he treated the sale as subsisting (s). This kind of case is very unusual. Acceptance intended for a person other

(o) *George Whitechurch, Ltd. v. Cavanagh* [1902] A. C. 117; *Ruben v. Great Fingall Consolidated* [1904] 2 K. B. 712, C. A.

(p) The current Anglo-Indian spelling -nashin is a mere blunder. It does not even represent a current mispronunciation.

(q) *Annoda Mohun Rai v. Bhuban Mohini Debi* (1901) 28 Cal. 546, 548.

(r) *Boulton v. Jones* (1857) 2 H. & N. 564; 115 R. R. 695. See Benjamin on Sale, 5th ed. 95, 96, where the learned author's suggestion of some different equitable rule is not supported by his latest editors. The present writer was never able to accept it.

(s) See *Mitchell v. Lapage* (1816) Holt, N. P. 253; 17 R. R. 633.

than the person actually making the offer might possibly happen by accident but in the reported cases it has been the result of fraudulent personation. The proposer has obtained credit, in effect, by pretending to be some person of credit and substance known to the acceptor, or the agent of such a person. In *Cundy v. Lindsay* (t), one Blenkarn closely imitated the address of a known respectable firm of Blenkiron & Co., and wrote his signature so as to look like theirs. A dealer to whom he wrote to order goods thought, as Blenkarn intended, that the order came from Blenkiron & Co., and sent the goods to the address given. It was held by the Court of Appeal and the House of Lords that, as the senders thought they were dealing with Blenkiron & Co., and knew nothing of Blenkarn, and had no intention of dealing with him, there was no contract, and Blenkarn acquired no property in the goods. Accordingly an innocent buyer of the goods—stolen goods, as they really were—from Blenkarn had no defence to an action by the original owners. Similarly, in a Punjab case, where A. entered into a contract with B., a brother of C., on the representation of B. that he was C., himself, the Chief Court of the Punjab held that the case was one within the section, and that there was no contract between A. and B. (u). It may be a delicate question in a case of this kind, if the transaction is between parties face to face, whether A.'s intent is to contract with the man then and there present, whatever he calls himself, or to contract only with C., the person with whom he thinks he is dealing. Some American authorities hold that an agreement with a person "identified by sight and hearing" is not absolutely void, though personation may render it voidable on the ground of fraud: but it is submitted as the better opinion that, although proof that there was no intention of contracting with the personator may be harder in such a case, the question is still a question of fact. On the same principle, if a man is induced to apply for shares in a company by falsely representing it to be identical with an older company of like name, there is no real agreement to take the shares (v).

(t) (1878) 3 App. Ca. 459; Finch, They could not, of course, have been Sel. Ca. 441, *Quære*, what would have been the result if by some lucky accident the goods had been delivered to Blenkiron & Co.? It seems they might have treated the goods as offered to them.

(u) *Jaggannath v. Secretary of State* (1896) Punj. Rec. no. 21.

(v) *Baillie's Case* [1898] 1 Ch. 110.

13. **As to the subject-matter of the agreement.**—It is quite possible for the parties to a contract to be under a common mistake of this kind. If the mistake is not common, it may happen, in very exceptional cases, that by reason of an ambiguous name, or the like, each party is mistaken as to the other's intention, and neither is estopped from showing his own intention (*w*). Otherwise a contract (assuming the other conditions for the formation of a contract to be satisfied) can be affected by such a mistake, not common to both parties, only where it is induced by fraud or misrepresentation. We shall find (see below on s. 18) that wilful acquiescence in the other party's mistake is equivalent to misrepresentation under certain circumstances. If the mistake is common, it can seldom, if ever, be said that there was no consent. A simpler and more correct explanation is to say that there was an agreement subject to a condition understood or implied in the nature of the agreement itself, though not expressed, and that condition has not been fulfilled. It may be that at the date of the agreement the condition is already incapable of fulfilment by reason of some fact unknown to the parties; as in the case of an agreement for the sale of a horse which in fact is dead, or a specific cargo which in fact is lost. In that case no operative obligation ever arises under the agreement. But this may be the case with any conditional contract. The interposition of a time of suspense, during which it cannot be known whether there will be an operative contract or not, can make no difference to the legal nature of the transaction. This particular class of cases, however, is specially dealt with by s. 20 of the Act.

In many cases falling under the foregoing heads, though not in all, the same result may be arrived at by observing that there is no consideration for the promise which it is sought to enforce.

Coercion wholly excluding consent.—Coercion might possibly be such as not only to prevent consent from being free (ss. 14, 15), but to exclude any real or intelligent consent altogether. In two English cases of our own time marriages have been declared void, in extremely peculiar circumstances, on the ground of combined fraud and coercion having operated on the pretended wife to such

(*w*) *Raffles v. Wichelhaus*, note (x), unconditionally, but in fact not in the p. 82, above; *Falck v. Williams* [1900] proposer's sense, and there was no contract. A. C. 176, where an offer made by an ambiguous code message was accepted

an extent that the marriage was not her voluntary act (x). No **§s. 13, 1** case of this kind is known to have occurred in the region of ordinary contract.

- 14.—Consent is said to be free when it is not caused by—
- “Free consent” defined.
- (1) coercion, as defined in section 15, or
 - (2) undue influence, as defined in section 16, or
 - (3) fraud, as defined in section 17, or
 - (4) misrepresentation, as defined in section 18, or
 - (5) mistake subject to the provisions of sections 20, 21, and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

Unfree consent.—Not only consent but free consent is declared by s. 10 to be necessary to the complete validity of a contract. The Act now proceeds to declare the meaning of this addition. Where there is no consent or no real and certain object of consent (cf. s. 29, p. 227, below) there can be no contract at all. Where there is consent, but not free consent, there is generally a contract voidable at the option of the party whose consent was not free. This section declares in general the causes which may exclude freedom of consent, leaving them to be more fully explained by the later sections referred to in the text. In one respect the language is open to objection. It seems, when read together with that of other relevant sections, to assume that there are cases in which a contract is voidable on the ground of mistake. We are not aware of any such cases. We have seen that certain kinds of mistake may exclude consent altogether. In such cases no real agreement is ever formed, or there is no real object on which the parties are agreed, and the seeming agreement is wholly void. Otherwise mistake, if not induced by misrepresentation or fraud, is inoperative. If there be any specific exceptions to this rule, the Act gives no clue to them; in fact, we do not believe there are any. The specific provisions of

(x) *Scott v. Sebright* (1886) 12 P. D. 21; *Ford v. Stier* [1896] P. 1, where the woman thought the ceremony was only a betrothal.

14, 15. the Act, however, cover the ground sufficiently to avoid any danger of serious error in practice.

15.—“Coercion” is the committing, or threatening to
 “Coercion”
 defined. commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—It is immaterial whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Illustration.

A., on board an English ship on the high seas, causes B. to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code.

A. afterwards sues B. for breach of contract at Calcutta.

A. has employed coercion, although his act is not an offence by the law of England, and although s. 506 of the Indian Penal Code was not in force at the time when or place where the act was done.

Extent of “Coercion” under the Act.—The words of this section are far wider than anything in the English authorities; it must be assumed that this was intended. In the original draft the word “coercion” is used but not defined. As the definition stands the coercion invalidating a contract need not proceed from a party to the contract, or be immediately directed against a person whom it is intended to cause to enter into the contract or any member of his household, or affect his property, or be specifically to his prejudice. In England the topic of “duress” at common law has been almost rendered obsolete, partly by the general improvement in manners and morals, and partly by the development of equitable jurisdiction under the head of Undue Influence. Detaining property is not duress. Two singular recent cases of marriage under coercion have been cited under s. 13 (p. 90, above).

Act forbidden by the Penal Code.—The words “act forbidden by the Indian Penal Code” make it necessary for the Court to decide in a civil action, if that branch of the section is relied on, whether the alleged act of coercion is such as to amount to an offence. The mere fact that an

agreement to refer matters in dispute to arbitration was entered into during the pendency and in fear of criminal proceedings is not sufficient to avoid the agreement on the ground of "coercion," though the agreement may be void as opposed to public policy within the meaning of s. 23 (y). It must further be shown that the complainant or some other person on his behalf took advantage of the state of mind of the accused to apply pressure upon him to procure his consent (z). So far as we are aware, there is no Indian case decided with express reference to the branch of the section now under consideration. In *Banda Ali v. Banspat Singh* (a), the High Court of Allahabad refused to enforce a bond executed by a judgment debtor in favour of the decree-holder to procure his release from custody in execution of a decree of a Court which had no jurisdiction to entertain the suit. The Court held that the bond was obtained when the judgment debtor was in duress, and it could be said with some amount of certainty that the decision proceeded on the ground (though no reasons are stated) that the alleged act of coercion amounted to an offence within the meaning of the Penal Code (b). The judgment of the High Court, so far as it holds that the bond was executed under coercion, seems open to question as involving the assumption that the arrest of a judgment debtor in execution of an apparently regular decree amounts to the offence of wrongful confinement if the Court is ultimately found to have no jurisdiction. This would be a dangerous doctrine to adopt in India, where the majority of suitors consist as a rule of illiterate and ignorant persons who cannot be expected to understand the respective jurisdictions of the Courts of various grades spread over different parts of the country. In the next place, assuming that the defendant abetted the offence of wrongful confinement, it does not appear that he did it with the intention of causing the plaintiff to execute the bond, though the plaintiff may have signed the bond with the object of procuring his release from custody. There is yet another case which might be considered under the present head. In that case (c) the High Court of Madras held that an adoption by a Hindu.

(y) *Gobardhan Das v. Jai Kishen Das* (1900) 22 All. 224; *Masjidi v. Mussammat Ayisha* (1882) Punj. Rec. no. 135.

(z) 22 All. p. 227, citing *Jones v. Merionethshire Building Society* [1892] 1 Ch. 173.

(a) (1882) 4 All. 352.

(b) See extract from judgment of the District Judge at p. 354 of the report.

(c) *Ranganayakamma v. Alwar Setti* (1889) 13 Mad. 214.

- S. 15. widow thirteen years old (d) was not binding upon her, it having been found that the relatives of the adopted boy obstructed the removal of the corpse of her husband from her house until she consented to the adoption. The decision proceeded on the ground that the widow's consent to the adoption was not free. The Court seems to have thought that the act of the relatives in obstructing the removal of the corpse was within the present section as being forbidden by the Indian Penal Code, but it does not appear under what section of the Code they would have held it punishable. The only section possibly applicable to obstructing the removal of a corpse would seem to be s. 297, which enacts *inter alia* that whoever with the intention of wounding the feelings of any person, or with the knowledge that the feelings of any person are likely to be wounded, offers an indignity to any human corpse, or causes to any persons assembled for the performance of funeral ceremonies, is liable to imprisonment or fine or both. On the facts of the case there could hardly be any doubt that the act was done with intent to wound the widow's feelings, or at any rate with the knowledge that her feelings would be wounded. The fact, therefore, would constitute an offence if obstructing the removal of the corpse could be regarded as an indignity offered to the corpse, or as a disturbance to the persons assembled to perform the funeral ceremonies. The act constituting coercion did not proceed from any party to the agreement, but the words of the section, as pointed out above, make this immaterial. In any event there would have been no difficulty in holding that the widow's consent was obtained by undue influence within the meaning of s. 16 of the Act.

In a recent Madras case the question arose whether if a person held out a threat of committing suicide to his wife and son if they refused to execute a release in his favour, and the wife and son in consequence of that threat executed the release, the release could be said to have been obtained by coercion within the meaning of this section? Wallis, C.J., and Seshagiri Aiyar, J., answered the question in the affirmative, holding in effect that though a threat to commit suicide was not *punishable* under the Indian Penal Code, it must be deemed to be *forbidden* by that Code as an *attempt* to commit suicide

(d) The Indian Majority Act IX of 1875 does not affect the capacity of any person to act in matters of adoption (s. 2). The capacity to adopt is determined by the personal law to which the party adopting is subject.

was punishable under that Code (s. 309). Oldfield, J., answered the question in the negative on the ground that the present section should be construed strictly, and that an act that was not punishable under the Penal Code could not be said to be forbidden by that Code (e). This view seems to be correct. A penal code forbids only what it declares punishable. It might be well to amend the present section by adding after "forbidden" such words as "or an attempt to commit which is forbidden"; but that is the business of the legislature, not of the Courts. The truth is that the language of the Act had omitted to take account of a singular case.

Unlawful detaining of property.—A refusal on the part of a mortgagee to convey the equity of redemption except on certain terms is not an unlawful detaining or threatening to detain any property within the meaning of this section (f).

16.—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

- (a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
- (b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that

(e) *Amiraju v. Seshama* (1917) 41 Mad. 33.

(f) *Bengal Stone Co. Ltd. v. Joseph Hyam* (1918) 27 Cal. L. J. 78, 80-82.

- s. 16. such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872.

Illustrations.

(a) A., having advanced money to his son, B., during his minority, upon B.'s coming of age obtains, by misuse of parental influence, a bond from B. for a greater amount than the sum due in respect of the advance. A. employs undue influence.

(b) A., a man enfeebled by disease or age, is induced, by B.'s influence over him as his medical attendant, to agree to pay B. an unreasonable sum for his professional services. B. employs undue influence.

(c) A., being in debt to B., the money-lender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B. to prove that the contract was not induced by undue influence.

(d) A. applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A. accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

This section was substituted for the original s. 16 by the Indian Contract Act Amendment Act VI of 1899, s. 2.

The section before it was amended stood as follows:—

“‘Undue influence’ is said to be employed in the following cases:—

“(1) When a person in whom confidence is reposed by another, or who holds a real or apparent authority over that other, makes use of such confidence or authority for the purpose of obtaining an advantage over that other which, but for such confidence or authority, he could not have obtained;

“(2) When a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion.”

There were no illustrations appended to the old section. Illustrations (a) and (b) of the present section are elementary law (g). They

(g) As to the relation between medical attendant and patient, see *Dent v. Bennett* (1839) 4 My. & Cr. 269; 48 R. R. 94. A gift of this kind may of course (like any other voidable transactions) become unimpeachable by subsequent confirmation: *Mitchell v. Homfray* (1881) 8 Q. B. Div. 587.

were intended to be added to the section in its original form, but for some reason withdrawn before the Act was passed. Illustrations (c) and (d) are evidently intended to explain the application and the limits of para. 3. s. 18.

The doctrine of Undue Influence in England.—"The equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud" (h). It applies alike to acts of pure bounty by way of gift and to transactions in the form of contract which are clearly more advantageous to one party than to the other. In combination with other special rules it may even be applied to transactions which do not show on the face of them any "unfair advantage." The sixteenth section of the Act, as it stood till 1899, did not adequately represent the generality of the English doctrine. In fact, however, one at least of the Indian High Courts acted boldly and beneficially on the general principles of English equity without fettering itself by the precise words of the Act. Another defect now remedied was that nothing was said in the Contract Act about the important question of burden of proof, and magistrates and practitioners were left to discover for themselves that the real working strength of this section could be understood only by reading it with s. 111 of the Evidence Act.

The English authorities are numerous, and many of them are complicated by questions on the one hand of actual fraud or on the other hand of breach of some special duty, such as that of an agent, which is independent of the state of mind of the parties. It will be sufficient for the present purpose to refer to a few of the leading authorities on the various points dealt with by the text of the Act. The first paragraph of the section lays down the principle in general terms; the second and third define the presumptions by which the Court is enabled to apply the principle. It is obvious that the same power which can "dominate the will" of a weaker party is often also in a position to suppress the evidence which would be required to prove moral constraint in a specific instance. Modification of the ordinary rules of evidence is accordingly necessary to prevent a failure of justice in such cases. Where the special presumptions do not apply, proof of undue influence on the particular occasion remains admissible, though strong evidence is

(h) Lindley, L.J., in *Allcard v. Skinner* (1897) 36 Ch. Div. 145, 183.

S. 16, required to show that, in the absence of any of the relations which are generally accompanied by more or less control on one side and submission on the other, the consent of a contracting party was not free. In the case of a pure voluntary gift (though there is no general presumption against the validity of gifts) the proof is less difficult; but this is not within our subject.

Sub-s. 1: Undue Influence generally.—The first paragraph gives the elements of undue influence: a dominant position and the use of it to obtain an unfair advantage. The words “unfair advantage” must be taken with the context. They do not limit the jurisdiction to cases where the transaction would be obviously unfair as between persons dealing on an equal footing. “The principle applies to every case where influence is acquired and abused, where confidence is reposed and betrayed” (i), or, as Sir Samuel Romilly expressed it in his celebrated argument in *Huguenin v. Baseley*, which has been made authoritative by repeated judicial approval (j), “to all the variety of relations in which dominion may be exercised by one person over another.” “As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties” (k). But the English cases on the subject have been said by the same authority to be divisible into two groups, according as the charge against the donee (to use this word for shortness’ sake) was of aggressive circumvention or of abusing the opportunities given by a duty.

“First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor. . . .

“The second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor or even to manage his property for him. . . . In

(i) Lord Kingsdown in *Smith v. Kay* (1859) 7 H. L. C. 750, at p. 779. This was a case of general control obtained by an older man over a younger one during his minority without any spiritual influence or other defined fiduciary rela-

tion.

(j) (1807) 14 Ves. 285: 9 R. R. 283: 48 R. R. 102: per Wright, J., [1893] 1 Ch. 752.

(k) Lindley, L.J., in *Allcard v. Skinner* (1887) 36 Ch. Div. at p. 183.

this class of cases it has been considered necessary to show that the donor had independent advice, and was removed from the influence of the donee when the gift to him was made" (l). S. 11

Sub-s. 2 : Different forms of influence.—The second paragraph of the present section makes a division of the subject-matter on a different principle, according to the origin of the relation of dependence, continuing or transitory, which makes undue influence possible. Such a relation may arise (a) from a special authority or confidence committed to the donee, or (b) from the feebleness in body or mind of the donor. However, it is impossible to find plain and clear-cut categories for transactions which are often obscure and complicated, and sometimes purposely made so. Practically the most important thing to bear in mind is that persons in authority, or holding confidential employments such as that of a spiritual, medical, or legal adviser, are called on to act with good faith and more than good faith in the matter of accepting any benefit (beyond ordinary professional remuneration for professional work done) from those who are under their authority or guidance. In fact, their honourable and prudent course is to insist on the other party taking independent advice (m). Following these principles, the High Court of Allahabad set aside a gift of the whole of his property by a Hindu well advanced in years to his *guru*, or spiritual adviser, the only reason for the gift as disclosed by the deed being the donor's desire to secure benefits to his soul in the next world (n). Similarly, where a *cestui que trust* had no independent advice, it was held that a gift by him to the trustee of certain shares forming part of the trust funds was void, though in the same case a gift of shares which did not form part of the trust funds was upheld (o). The case

(l) 36 Ch. Div. at p. 181.

(m) In the case of a gift from client to solicitor it is an essential condition to the validity of the gift that the client should have competent independent advice: *Liles v. Terry* [1895] 2 Q. B. 679 C. A., following and explaining *Rhodes v. Bate* (1865) L. R. 1 Ch. 252, and other earlier authorities: and the Court must also be satisfied that the influence has in fact ceased; *Wright v. Carter* [1903] 1 Ch. 27. It is hardly too much to say that such a gift, what-

ever it may be in form, is practically revocable. The principle of *Liles v. Terry* was followed in *Rajah Papanma Row v. Sitaramayya* (1895) 5 Mad. L. J. 234.

(n) *Mannu Singh v. Umadat Pande* (1890) 12 All. 523.

(o) *Raghunath v. Varjivandas* (1906) 30 Bom. 578; *Knight v. Marjoribanks* (1849) 2 Mac. & G. 10; 2 H. & Tw. 308. As to purchase by a trustee from a beneficiary, see *Indian Trusts Act*, 1882, s. 53.

8. 16. of *Wajid Khan v. Ewaz Ali* (p), in which the Judicial Committee set aside a deed of gift executed by an old illiterate Mahomedan lady in favour of her confidential managing agent, comes under this head. And so does the case in which the High Court of Bengal refused to enforce an agreement executed by a poor woman in favour of her *mookhtear* by which she bound herself to give him, by way of remuneration for his services, one half of the property which she might recover by his assistance (q). The same principles apply to agreements for remuneration between an attorney and a client (r) and between a managing clerk in an attorney's office and a client (s). A parent stands in a fiduciary relation towards his child, and any transaction between them by which any benefit is procured by the parent to himself or to a third party at the expense of the child will be viewed with jealousy by courts of equity, and the burden will be on the parent or third party claiming the benefit of showing that the child in entering into the transaction had independent advice, that he thoroughly understood the nature of the transaction, and that he was removed from all undue influence when the gift was made. Upon these principles the High Court of Madras refused to enforce against an adopted son a deed of trust of joint family property executed by him and his adoptive father whereby annuities were created in favour of certain relations of the father, in a suit brought by them after the father's death to recover arrears of annuities. The deed was executed by the son soon after he attained majority, and there was no evidence to show that the son had independent advice, or that he understood the nature of the transaction, or that his father's influence had ceased when the document was executed (t). The relations subsisting between a *malik* and a cultivator are such that the *malik* is in a position to dominate the will of the cultivator (u). But the presumption of undue influence does not apply to a gift by a mother to her daughter. If such a gift is sought

(p) (1891) 18 Cal. 545: L. R. 18 Ind. Ap. 144.

(q) *Pushong v. Mania Halwani* (1868) 1 B. L. R. A. C. 95.

(r) *Brojendra Nath v. Sreemutty Luckhey Money* (1901) 6 C. W. N. 816; *Shamaldhone Dubt v. Lakshimani Debi* (1908) 36 Cal. 493.

(s) *Harivalabhdas v. Bhai Jivanji*

(1902) 26 Bom. 689.

(t) *Lakshmi Doss v. Roop Loll* (1907) 30 Mad. 189, in app. from 29 Mad. 1.

(u) *Kashi Nath v. Durga Prasad* (1916) 1 Pat. L. J., 604. As to transactions between a guardian and a ward, soon after the ward has ceased to be a minor, see *Guardian and Wards Act*, 1890, s. 20.

to be set aside on the ground of undue influence, the burden lies upon those who seek to avoid it to establish domination on the part of the daughter and subjection of the mother (v). Age and capacity are important elements in determining whether consent was free in the absence of any confidential relation, but as against the presumption arising from the existence of such a relation they count for very little (w). Clause (b) of this paragraph seems to include the principle, established by a series of English decisions, that "where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction" (x). Infirmary of body or mind on the vendor's part will make it still more difficult to uphold any such contract. As to the effect of inadequacy of consideration see s. 25, expl. 2, p. 189, below.

Mental distress.—"A state of fear by itself does not constitute undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement." The mere fact, therefore, that a submission was executed by the defendant during the pendency and under fear of a criminal prosecution instituted against him by the plaintiff will not avoid the transaction on the ground of "undue influence." It was so held by the High Court of Allahabad (y) in a case decided under the old section. The decision would, it seems, be the same under the section as it now stands. It could not be said in the case above that the plaintiff was in a position to dominate the will of the defendant merely by reason of the fact that criminal proceedings had been pending against the defendant at the time when the submission was executed by him; but assuming that he was there is nothing to show in the facts of the case that the plaintiff used any such position to obtain an unfair advantage over the defendant. "The law says that (1) not only the defendant *must have a dominant position*, but (2) he must use it" (z). Both these elements were present in the case where the High

(v) *Ismail Mussajee v. Hafiz Boo* (1906) 33 Cal. 773; L. R. 33 Ind. Ap. 86.
 (w) *Rhodes v. Bate*, L.R. 1 Ch. at p. 257.
 (x) Per Kay, J., *Fry v. Lane* (1888) 4 Ch. D. 312, 322, the latest reported case of this class.
 (y) *Gobardhan Das v. Jai Kishen Das* (1900) 22 All. 224. See also *Maajidi v. Mussammat Ayisha* (1832) Panj. Rec. no. 135.
 (z) *Amjadnessa Bibi v. Rahim Buksh* (1915) 42 Cal. 286. See also *Bara Estate, Ltd. v. Anup Chand* (1917) 2 Pat. L. J. 663, at p. 670.

18. Court of Madras refused to enforce an agreement entered into by a Hindu widow to adopt a boy to her husband, it appearing on evidence that the relatives of the boy obstructed the removal of her husband's corpse from the house unless she consented to the adoption (a). The same elements are also to be found in the case where the Allahabad High Court set aside a deed of gift executed by an indigent Brahman to a temple of which the defendant had charge, it having been found that the gift left the donor without any means, and that the defendant had motives of personal gain in procuring it. The gift was made while the donor was living in the defendant's house, where he was fed and maintained by him, and during the pendency of a suit to recover the property prosecuted by the defendant on behalf of the donor at his own expense (b).

In a Madras case where the plaintiffs agreed to relinquish their right to a religious office in favour of the defendant in consideration of the latter withdrawing a charge of criminal trespass preferred against them, it was held that the agreement was voidable, the charge of trespass being false, and the sole cause for entering into the agreement being "the well-founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings" (c). Similarly where criminal proceedings were threatened against a *mookadam* for misappropriation of his master's moneys, and a bond was passed by an ignorant Hindu widow who had brought him up as her son to save him from the threatened prosecution, it was held that the agreement was not binding upon the widow, she having had no independent advice (d). See s. 19A ill. (a).

Proof of undue influence.—In dealing with cases of undue influence there are four important questions which the Court should consider, namely, (1) whether the transaction is a righteous transaction, that is, whether it is a thing which a right-minded person might be expected to do; (2) whether it was improvident, that is to say, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he

(a) *Ranganayakamma v. Alwar Setti* pally (1874) 7 M. H. C. 378.
(1889) 13 Mad. 214.

(b) *Sital Prasad v. Parbhu Lal* (1888) Bom. 586. See also *Rangnath v. Govind* (1904) 28 Bom. 639.

(c) *Pudishary Krishneu v. Karam-*

(d) *Kesooji v. Hurjiwan* (1887) 11

was doing ; (3) whether it was a matter requiring a legal adviser ; and S. 16
(4) whether the intention of making the gift originated with the donor (e).

Transaction with Parda-nishin women.—From a time before, though not long before, the passing of the Contract Act, some of the High Courts, with a certain amount of support from the Judicial Committee, have treated *parda-nishin* women (sometimes in terms only Hindu women, but if a woman is in fact secluded it cannot matter whether she is a Hindu or not) as a class of persons specially exposed to undue influence, and have gone near to laying it down as a rule of law that every one dealing with a *parda-nishin* woman is bound to show affirmatively that she understood the nature of the transaction, and that the terms were fair. The rule was stated by the late Sir W. Rattigan, in a paper where he forcibly criticised this policy (f), to have been first announced in 1867 in a Calcutta case not regularly reported. "It does not necessarily follow," Sir W. Rattigan observed, "that a native woman simply because she sits behind the *parda*, is to be placed in the same category as the 'weak, ignorant, and infirm persons' whom the Court of Chancery, under a proper interpretation of its approved practice, is accustomed to protect. On the contrary, it is common experience to find in India *parda* ladies who are highly intelligent, strong minded, and who possess excellent business capacity, and contrive to manage large estates with great success. To adopt a sweeping generalisation, and to hold that every *parda-nashin* lady who enters into any commercial transaction, or who makes a disposition of her property, is presumably the victim of 'undue influence,' is to make an assumption which is contrary to actual facts, and to cause the law to be abused for the purpose of avoiding *bond fide* engagements."

In the earliest Privy Council decision on the subject, where a Mahomedan lady sued to recover from her husband the value of Company's paper of a considerable amount alleged to have been endorsed and handed over to him to receive interest thereon, and the defence was that he had purchased the paper from his wife, it was held by their

(e) Per Lord Macnaghten in *Mahomed Buksh v. Hosseini Bibi* (1888) 15 Cal. 684, at pp. 698-700 L. R. 15 Ind. App. 81, at pp. 92-93.

(f) "The *Parda Nashin* (sic) Woman and her Protection by British Courts of Justice," *Journ. Comp. Legish.*, December, 1901, pp. 252, 257, 258.

16. Lordships that, though the wife failed to prove affirmatively the precise case set up by her in the plaint, the burden of proof was upon the husband to show, the plaintiff being a *parda-nishin*, that the sale was a *bonâ fide* one for value, and that upon the evidence he had failed to satisfy the burden (g). A few years later it was declared by the same tribunal that, as regards deeds taken from *parda* women, the Courts have always been careful to see "that the party executing them has been a free agent, and duly informed of what she was about" (h). It is not sufficient to show that a document executed by a *parda-nishin* woman was read out to her; it must further be shown that it was explained to her or that she understood its conditions and effect (i). The reason is that the ordinary presumption that a person understands the document to which he has affixed his name does not apply in the case of a *parda-nishin* woman (j).

The law as to the burden of proof was thus summarized in a recent decision of the Judicial Committee (k): "In the first place, the lady was a *parda-nishin* lady, and the law throws around her a special cloak of protection. It demands that the burden of proof shall in such a case rest, not with those who attack, but with those who found upon

(g) *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* (1867) 11 M. I. A. 551. A mortgage of property belonging to male and female members of a Mahomedan family by the males does not operate as a transfer of the interest of the females, because the management of the properties is left in the hands of the males: *Azima Bibi v. Shamalanand* (1913) 40 Cal. 378 [P. C.]

(h) *Gereesh Chunder v. Bhuggobutty* (1870) 13 M. I. A. 419, 431; *Sudisht Lal v. Sheobarat Koer* (1881) 7 Cal. 245; L. R. 8 Ind. Ap. 39; *Behari Lal v. Habiba Bibi* (1886) 8 All. 267; *Annoda Mohun Rai v. Bhuban Mohini Debi* (1901) 28 Cal. 546; L. R. 28 Ind. Ap. 71.

(i) *Shambati Koeri v. Jago Bibi* (1902) 29 Cal. 749; 29 I. A. 127; *Sham Koer v. Dah Koer* (1901) 29 Cal. 664; L. R. 29 Ind. Ap. 132; *Mirza Sajjad Husain*

v. Nawab Wazir Ali Khan (1912) 39 I. A. 156; *Kali Baksh v. Ram Gopal* (1914) L. R. 41 I. A. 23, 29; 36 All. 81, 89; *Sri Kishan Lal v. Kashmiro* (1916) 14 All. L. J. 1236, 1244 [P. C.]; *Sumsuddin v. Abdul* (1907) 31 Bom. 165.

(j) *Ashgar Ali v. Delroos Banoo Begum* (1877) 3 Cal. 324; *Mariam Bibi v. Sakina* (1892) 14 All. 8; *Atchhan Kuar v. Thakur Das* (1895) 17 All. 125; *Hoti Lal v. Musammam* (1903) Punj. Rec. no. 77. In *Ashgar Ali's* case the Judicial Committee set aside a *taulikat-nama* executed by a Mahomedan lady on the false representation that the effect of the document was what she desired. The case looks very like one of positive fraud.

(k) *Kali Baksh v. Ram Gopal* (1914) L. R. 41 I. A. 23, 28-29; 30 All. 81, 89; *Muhammad Ibrahim v. Umatullah Jan.* (1917) Punj. Rec., no. 90, p. 350.

the deed, and the proof must go so far as to shew affirmatively and conclusively that the deed was not only executed by, but was explained to, and was really understood by the grantor. In such cases it must also, of course, be established that the deed was not signed under duress, but arose from the free and independent will of the grantor. The law as just stated is too well settled to be doubted or upset." 8. 16.

Some Indian decisions suggest that a deed of gift by a parda-nishin woman is invalid in the absence of proof that she had independent advice. But in *Kali Bakhsh v. Ram Gopal* (l) the Judicial Committee held that there is no rule of law of the absolute kind above indicated. "The possession of independent advice, or the absence of it, is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue of whether the grantor thoroughly comprehended, and deliberately and of her own free will carried out, the transaction. If she did, the issue is solved and the transaction is upheld; but if upon a review of the facts which include the nature of the thing done and the training and habit of mind of the grantor, as well as the approximate circumstances affecting the execution—if the conclusion is reached that the obtaining of independent advice would not really have made any difference in the result then the deed ought to stand. The present, in their Lordships' judgment, appears to be a case of that kind In short their view is that if independent outside advice, which is an essentially different thing from independent outside control, had been obtained, the lady would have acted just as she did. Much as their Lordships support and approve of the protection given by law to a parda-nishin lady, they cannot transmute such a legal protection into a legal disability. She might, especially if the outside adviser had been a lawyer, have altered the shape or form of the transaction, but in substance and result she would have carried out the same purpose and will as are expressed by the deed under challenge. They refer to the judgment of Lord Macnaghten in *Mahomed Buksh Khan v. Hosseini Bili*" (m).

It may be noted that "the undue influence which may affect a parda-nashin lady's understanding of a document may proceed from a third party." It was so held by Jenkins, C.J., in a case where a mortgage of her property by a parda-nashin lady to a creditor of her husband was set aside, the undue influence having proceeded from the husband (n).

(l) (1914) L. R. 41 I. A. 23; 36 All. 81. (In this case the J. C. upheld a gift by a Parda-nishin woman of about one half of her estate to her paramour's son on the ground that there was no undue influence); *Keshub Lall v. Radha Raman* (1913) 17 C. W. N. 991; *Mahatur Prasad v. Taj Begum* (1915) 19 C. W. N. 162.
(m) (1888) L. R. 15 Ind. App. 81; 15 Cal. 684. In this case the charge of

undue influence was discredited by being made as an afterthought and not by the lady herself who was the original plaintiff, but by her representative after her death.

(n) *Badiatannessa Bibee v. Ambika Charan* (1914) 18 Cal. W. N. 1133. Compare *Bank of Montreal v. Stuart* [1911] A. C. 120.

8. 16. It appears on a review of the above decisions that most, if not all, of them could have been arrived at without the aid of any general presumption, on such grounds as that the act was done under the influence of marital control, or actual fraud or misrepresentation, or even in total ignorance of its nature and effect. The only thing in English law that seems analogous to the treatment of a *parda-nishin* woman's dealings as presumably invalid is the treatment of dealings with "expectant heirs" by Courts of Equity, where fraud is said to be "presumed from the circumstances and condition of the parties contracting." But this equitable doctrine is peculiar, and depends, in part at any rate, on peculiar reasons not existing in India (o).

Who is a *Parda-Nishin*.—The expression "*parda-nishin*" connotes complete seclusion. It is not enough to entitle a woman to the special care with which the Courts regard the disposition of a *parda-nishin* woman that she lives in some degree of seclusion (p). Thus a woman who goes to Court and gives evidence, who fixes rents with tenants and collects rents, who communicates, when necessary, in matters of business, with men other than members of her own family, could not be regarded as a *parda-nishin* woman (q). In *Hodges v. The Delhi and London Bank, Limited* (r), a Privy Council case, it was said: "It is abundantly clear that Mrs. Hodges was not a *parda-nishin*. The term *quasi-parda-nishin* seems to have been invented for this occasion. Their Lordships take it to mean a woman who, not being of the *parda-nishin* class, is yet so close to them in kinship and habits, and so secluded from ordinary social intercourse, that a like amount of incapacity for business must be ascribed to her, and the same amount of protection which the law gives to *parda-nishins* must be extended to her. The contention is a novel one, and their Lordships are not favourably impressed by it. As to a certain well-known and easily ascertained class of women, well-known rules of law are established, with the wisdom of which we are not now concerned; outside that class it must depend in each case on the

(o) See Pollock, Principles of Contract, ed. 8, 663 sqq. *O'Rourke v. Bolingbroke*, (1877) 2 App. Ca. 814, marks the limit of its application.

(p) *Shaik Ismail v. Amirbibi* (1902) 4 Bom. L. R. 146, 148.

(q) *Ismail Musasjee v. Hafiz Boo* (1906) 33 Cal. 773, 783; L. R. 33 Ind. Ap. 86; *Shaik Ismail v. Amirbibi* (1902) 4 Bom. L. R. 146.

(r) (1901) 23 All. 137, 145; L. R. 27 Ind. Ap. 163.

character and position of the individual woman whether those who deal with her are or are not bound to take special precautions that her action shall be intelligent and voluntary, and to prove that it was so in case of dispute." S. 18.

Sub-s. 3: Rule of evidence.—The third paragraph of the present section does not lay down any rule of law, but throws the burden of proving freedom of consent on a party who, being in a dominant position, makes a bargain so much to his own advantage that, in the language of some of the English authorities, it "shocks the conscience." Money-lending cases are those chiefly contemplated (see illustration (c)). In fact, the language of the section as amended only declares what the High Courts, with or without literal authority, but acting in the spirit of the English equitable doctrine, have been doing for many years. It must not be supposed, however, that there may not be other forms of unconscionable bargain within the mischief and the remedy of this enactment.

"Unconscionable bargain."—Illustration (c) contemplates the case of a person already indebted to a money-lender contracting a fresh loan with him on terms on the face of them unconscionable. In such a case a presumption is raised that the borrower's consent was not free. The presumption is rebuttable, but the burden of proof is on the party who has sought to make an exorbitant profit of the other's distress. The question is not of fraud, but of the unconscientious use of superior power. Inadequacy of consideration, though it will not of itself avoid a contract (s. 25, expl. 2, below), has great weight in this class of cases as evidence that the contract was not freely made. As observed in a recent Bombay case, "inadequacy of consideration in conjunction with the circumstances of indebtedness and ignorance were facts from which it would have been as permissible before the amendment of [this section] to infer the use of undue influence as it would be since that amendment" (s). Relief in cases of unconscionable bargains is an old head of English equity. It was formerly associated in a special manner with sales of reversionary interests, which the Court was eager to restrain; and for some time it was the doctrine of the Court that a sale of any reversionary interest, if proved to have been made for only a little under

- S. 16. the value, must be set aside without further inquiry. This rule was at last found so inconvenient that it was abolished by statute. But the general principles of equity in dealing with what are called "catching bargains" remain, and the third clause of the section now before us is apparently intended to embody them. In fact, the Indian High Courts had acted on these principles, both before and since the passing of the Contract Act, without any express letter of written law to justify them in so doing. Thus, where the interest was exorbitant, relief was granted by reducing the rate of interest in cases where the loan was made to an illiterate peasant (*t*), and to a Hindu sixteen years old (*u*) (but not a minor according to the Hindu law). And where an heir to an estate borrowed Rs. 3,700 to enable him to prosecute his claim at a time when he was without even the means of subsistence and gave the lender a bond for Rs. 25,000 to be paid after receiving possession of the property, the Court held that the bargain was hard and unconscionable, and gave the lender a decree for Rs. 3,700, with interest at 20 per cent. per annum (*v*). Acting upon the same principles, the High Court of Bombay has held that a covenant in a mortgage executed by illiterate peasants in favour of a money-lender to sell the mortgaged property to the mortgagee at a gross undervalue in default of payment of interest was inequitable and oppressive, and the mortgage was set aside to that extent (*w*). The doctrine above enunciated was applied in a recent case decided since the amendment of the present section, where the High Court of Allahabad disallowed compound interest payable at 2 per cent. per mensem with monthly rests in the case of a bond executed by a spendthrift and a drunkard eighteen years old (*x*). And where a person twenty-eight years old, the son of a wealthy father, but

(*t*) *Lalli v. Ram Prasad* (1886) 9 All. 74. See also the observations of the Judicial Committee in *Kamini v. Kali-prasunno Ghose* (1885) 12 Cal. 225, 238, 239; L. R. 12 Ind. Ap. 215, where the loan was made to a *parda-nashin* lady.

(*u*) *Mothwormohun Roy v. Soorendro Narain Deb* (1875) 1 Cal. 108. The Indian Majority Act, which fixes the age of majority at eighteen, was passed on 2nd March 1875.

(*v*) *Chunni Kuar v. Rup Singh* (1888) 11 All. 57, confirmed on appeal *sub nom. Raja Mokham Singh v. Raja Rup Singh* (1893) 15 All. 352; 20 Ind. Ap. 127. See also *Husain Baksh v. Rahmat Husain* (1888) 11 All. 128.

(*w*) *Kedari Bin Ranu v. Atmarambhat* (1866) 3 B. H. C. A. C. 11.

(*x*) *Kirpa Ram v. Sami-ud-din* (1903) 25 All. 284.

of profligate habits and greatly in need of money, his father having refused to provide him with any money, executed a bond to secure a sum of Rs. 500 with interest at the rate of Rs. 37-8-0 per cent. per annum with six-monthly rests, with a stipulation that the borrower should not be empowered to pay the money within three years, and if he did pay within three years, he should nevertheless be obliged to pay three years' interest at the rate above mentioned, the same Court held that the bargain was unconscionable, and gave the lender a decree for Rs. 500 with simple interest at the rate of 24 per cent. per annum (y). On the same principle, where a poor Hindu widow borrowed Rs. 1,500 from a money-lender at 100 per cent. per annum for the purpose of enabling her to establish her right to maintenance, the High Court of Madras allowed the lender interest at 24 per cent. (z). Similarly, where a talukdar, who had been declared a "disqualified proprietor" under the provisions of the Oudh Land Revenue Act, 1876, and whose property was placed in the charge of the Court of Wards on the ground of his indebtedness and consequent inability to manage it, executed a bond for Rs. 10,000 repayable with interest at 18 per cent. per annum, and compound interest in default of payment of instalments, the Judicial Committee disallowed compound interest on the ground that the position of the parties was such that the lender was "in a position to dominate the will" of the borrower, and that the charging of compound interest in the circumstances of the case was "unconscionable" (a). The relief, however, has not been confined to money-lending transactions, and so far back as

S. 16.

(y) *Balkishan Das v. Madan Lal* (1907) 29 All. 303. Doubted in *Kesavulu v. Arithulai* (1913) 36 Mad. 533, at p. 537.

(z) *Rannee Annapurni v. Swaminathas* (1910) 34 Mad. 7.

(a) *Dhanipal Das v. Maneskar Bakhsh Singh* (1906) 28 All. 570; L. R. 33 Ind. Ap. 118; *Maneskar Bakhsh Singh v. Shadi Lal* (1909) 31 All. 386; L. R. 36 Ind. Ap. 96. The same principle has been applied where two persons who were under arrest for non-payment of Government revenue obtained from the *talukdar* temporary release to go to a

money-lender, and subsequently borrowed Rs. 99 from the money-lender and executed a mortgage-bond bearing compound interest at the rate of 37½ per cent. per annum with half-yearly rests. In a suit by the money-lender to recover the amount the Court held that the bargain was unconscionable, and allowed 18 per cent. compound interest. *Baldeo Singh v. Bulaki Das* (1910) 7 All. L. J. 591. In *Abdul Majid v. Khirade Chandrapal* (1915) 42 Cal. 690, the Court allowed a reduction in the rate of interest in the peculiar circumstances of the case.

3, 18, the year 1874 the Judicial Committee set aside a bond obtained by a powerful and wealthy banker from a young zamindar who had just attained his majority, and had no independent advice, by threats of prolonging litigation commenced against him by other persons with the funds and assistance of the banker (b). Three years later the same tribunal set aside an *ikrarnama* executed by a minor and another who had just come of age of half of their property in favour of the defendants, who had no title to the property, and who had taken possession thereof by show of force and with the assistance of a large body of retainers (c). Similarly, where the plaintiff, an illiterate agriculturist heavily indebted to the defendant, who was a money-lender, passed a sale-deed to the defendant of his lands worth thrice the amount of the debt under pressure of payment, the High Court of Bombay ordered by its decree that the sale should be set aside on the plaintiff paying to the defendant the debt owed by him within a fixed period (d). But the question whether a transaction should be set aside as being inequitable depends upon the circumstances existing at the time of the transaction, and not on subsequent events (e).

As between parties on an equal footing high interest, and even the holding of securities for a greater sum than has been actually advanced, will not suffice to make the Court hold a bargain unconscionable. Where both the parties to a mortgage were money-lenders, and the mortgage purported to be a security for Rs. 5,000 as principal and Rs. 1,250 *sawai* in lieu of interest repayable by seventy-two instalments, it was held that, though the interest on an instalment in arrear was to run at 24 per cent. per annum, and though the mortgagor retained Rs. 100 on account of *khichadi* (bonus) out of the Rs. 5,000 purporting to have been advanced to the mortgagor, the transaction was not unconscionable, regard being had to the fact that it was the practice of the mortgagor himself to make advances on similar terms (f). Similarly, though the agreement be by a mortgagor

(b) *Chedambara Chetty v. Renja* 25 Bom. 126.
Krishna Mulhu (1874) 13 B. L. R. 509;
 L. R. 1 Ind. Ap. 241. (c) *Ganga Baksh v. Jagat Bakadur*
Singh (1895) 23 Cal. 15; L. R. 22 Ind.
 Ap. 163.
 (e) *Prem Narain Singh v. Parasram*
Singh (1877) 4 Ind. Ap. 101. (f) *Hari Lahu Patil v. Ramji Valad*
Pandu (1904) 28 Bom. 371.

for sale of his equity of redemption to the mortgagee upon onerous terms, the Court will not therefore refuse specific performance if the bargain is not unconscionable and there is no evidence to show that the mortgagee took an improper advantage of his position or of the mortgagor's difficulties (g). S. 16,

On examining the cases relating to money-lending transactions cited in the preceding paragraph, it will be observed that in each of them the lender was "in a position to dominate the will" of the borrower, and the bargain was "unconscionable" within the meaning of cl. (3) of the present section. It is only the concurrence of these two elements that can justify the Court in granting relief to the borrower. The mere fact that the rate of interest is exorbitant is no ground for relief under this section (h), unless it be shown that the lender was in a position to dominate the will of the borrower. And it has recently been held by the highest tribunal that urgent need of money on the part of the borrower does not of itself place the lender in a position to dominate his will within the meaning of this section (i). In fact, even before the decision of the Privy Council, the Courts of India consistently declined to interfere except in two cases which must now be taken as overruled (j) where relief was claimed against an exorbitant rate of interest on the ground that the borrower was in urgent need of money. Upon the same principle the fact that a person parts with his properties for what he considers an unduly low price owing to his pressing necessities is not a ground

(g) *Davis v. Maung Shwe Go* (1911) 38 Cal. 805; L. R. 38 Ind. Ap. 155.

(h) As to relief where a stipulation for the payment of interest amounts to a penalty, see s. 74 below and the notes thereon.

(i) *Sundar Koer v. Rai Sham Krishen* (1907) 34 Cal. 150; L. R. 34 Ind. Ap. 9; *Ganesh v. Vishnu* (1907) 32 Bom. 37; *Umesh Chandra v. Golap Lal* (1903) 31 Cal. 233; *Chattring v. Whitchurch* (1907) 32 Bom. 208; *Debi Sahai v. Ganga Sahai* (1910) 32 All. 589; *Neghraj v. Gange Baksh* (1910) All. L. J. 729; *Meghraj v. Harguyan* (1910) 7 All. L. J. 655; *Sri Chand v. Niader Singh* (1911)

8 All. L. J. 407; *Kesavulu v. Arithulai* (1913) 36 Mad. 533; *Ponnusami v. Nadinuthu* (1917) 33 Mad. L. J. 302.

(j) *Madho Singh v. Kashi Ram* (1887) 9 All. 228 and *Poma Dongra v. William Gillespie* (1907) 31 Bom. 348. The decision in *Madho Singh's* case was expressly dissented from by the High Court of Calcutta in *Umesh Chandra's* case. In *Poma Dongra's* case the point of law, if any, for which the case was reported must have been as here assumed; but, as only the judgment is given, it is impossible to say whether on the facts the decision was or was not justified.

for setting aside the alienation, unless it be shown that the alienee was in a position to dominate the will of the alienor (*k*). "If people with their eyes open choose wilfully and knowingly to enter into unconscionable bargains, the law has no right to protect them" (*l*). As observed by the Judicial Committee, a transaction may undoubtedly be improvident, but in the absence of any evidence to show that the money-lender had unduly taken advantage of his position, it is difficult for a Court of Justice to give relief on grounds of simple hardship (*m*). The law on this subject, however, has been considerably altered since the enactment of the Usurious Loans Act, 1918.

It may be observed, before leaving this subject, that the Courts of British India ought to decide cases under this section according to its terms, and to resort to English decisions only so far as they illustrate its provisions. This warning was given by the Judicial Committee in *Dhanipal Das v. Maneshar Bakhsh Singh* (*n*), where their Lordships said: "The Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. *He ought to have considered the terms of the amended section 16 only.* He also mistook the English law. Apart from a recent statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud. . . . In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case."

Lapse of time and limitation.—Delay and acquiescence do not bar a party's right to equitable relief on the ground of undue influence, unless he knew that he had the right, or, being a free agent

(*k*) *Sundarambal v. Yogavanagurukal* (1915) 38 Mad. 850.

(*l*) *Mackintosh v. Wingrove* (1879) 4 Cal. 137; *Satish Chunder v. Hem Chunder* (1902) 29 Cal. 823; *Umesh Chandra v. Golap Lal* (1903) 31 Cal. 233; *Kirti Chunder v. Atkinson* (1905) 10 C. W. N. 640; *Tarachand v. Girdhari Lal* (1889) All. W. N. 167; *Hem Raj v. Khuda Bakhsh* (1905) Punj. Rec. no. 13.

(*m*) *Aziz Khan v. Duni Chand* (1918) Punj. Rec. no. 101, p. 334.

(*n*) (1906) 28 All. 570; L. R. 33 Ind. Ap. 118. The relief granted below was substantially confirmed on the ground that the facts brought the case within the section. The borrower "was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards," and "the lender used his position to demand more onerous terms than were reasonable."

at the time, deliberately determined not to inquire what his rights were or to act upon them (o). Lapse of time is not a bar in itself to such a relief. There must be conduct amounting to confirmation or ratification of the transaction (p). If there be no such conduct, it is open to the party, though he may not sue to set aside the transaction within the period of limitation to plead undue influence as a defendant in a suit brought against him to enforce the transaction. As observed by Sir Lawrence Jenkins, C.J., "A defendant in a suit is entitled to resist a claim made against him by pleading fraud [or undue influence], and he is entitled to urge that plea though he may not have himself brought a suit to set aside the transaction, and is not, in circumstances like the present, precluded from urging the plea by the [law of limitation]" (q). This statement of the law was adopted in a recent Madras case where it was said: "We do not think it follows that because a party's remedy as plaintiff to have an instrument avoided is time-barred, his right to say by way of equitable defence, if sued, that the instrument ought not to be enforced is equally time-barred" (r). This is in entire accordance with the authorities familiar in English equity practice, to which it is needless to make further reference.

Rights of legal representatives.—A sale-deed obtained by an uncle from her niece by the exercise of undue influence, the uncle standing in a fiduciary relation to the niece, may be set aside, after the death of the niece, by her legal representative (s).

17.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1) the suggestion, as to a fact, of that which is not true by one who does not believe it to be true ;

(o) *Lakshmi Doss v. Roop Loll* (1907) 30 Mad. 169.

(p) *Allcard v. Skinner* (1887) 36 Ch. Div. 145, at pp. 181, 182, 186; *Wright v. Vanderplank* (1856) 8 D. M. & G. 133, 114 R. R. 60.

(q) *Rangnath Saktharam v. Govind Narasim* (1904) 28 Bom. 639.

(r) *Lakshmi Doss v. Roop Loll* (1907) 30 Mad. 169, 173.

(s) *Govind v. Savitri* (1913) 20 Bom. L. R. 911; Indian Trusts Act, 1882, s. 88.

- S. 17.** (2) the active concealment of a fact by one having knowledge or belief of the fact ;
 (3) a promise made without any intention of performing it ;
 (4) any other act fitted to deceive ;
 (5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations.

- (a) A. sells, by auction, to B., a horse which A. knows to be unsound. A. says nothing to B. about the horse's unsoundness. This is not fraud in A.
 (b) B. is A.'s daughter and has just come of age. Here, the relation between the parties would make it A.'s duty to tell B. if the horse is unsound.
 (c) B. says to A.—“ If you do not deny it, I shall assume that the horse is sound.” A. says nothing. Here A.'s silence is equivalent to speech.
 (d) A. and B. being traders, enter upon a contract, A. has private information of a change in prices which would affect B.'s willingness to proceed with the contract. A. is not bound to inform B.

Fraud in general.—Fraud is committed wherever one man causes another to act on a false belief by a representation which he does not himself believe to be true. He need not have definite knowledge or belief that it is not true (*t*). When fraud produces damage it is generally a wrong entitling the person defrauded to bring a civil action. Under the Contract Act we are concerned with the effects of fraud only so far as consent to a contract is procured by it. We have already pointed out that the result of fraudulent practice may sometimes be a complete misunderstanding on the part of the person deceived as to the nature of the transaction undertaken, or the person of the other party. Such cases are exceptional. Where

(*t*) This is well settled in England: 93 R. R. 732.

Evans v. Edmonds (1853) 13 C. B. 777 ;

they occur, there is not a contract voidable on the ground of fraud, S. 17. but the apparent agreement is wholly void for want of consent, and the party misled may treat it as a nullity even as against innocent third persons. But the fraudulent party is of course estopped from denying that there is a contract if the party deceived finds it to be his interest to affirm the transaction, which is a conceivable though not probable case. In the same way the party deceived must be at liberty to treat the transaction as a voidable contract if he thinks fit. No doubt many transactions have in fact been so treated notwithstanding that under the law as settled in *Cundy v. Lindsay* (u) they might have been declared wholly void.

Sub-s. 3.—The language of the Act throws no light on the relation of fraud to misrepresentation. It might even be said to obscure it. That relation, however, may be very simply stated. Fraud, as a cause for the rescission of contracts, is generally reducible to fraudulent misrepresentation. Accordingly we say that misrepresentation is either fraudulent or not fraudulent. If fraudulent it is always a cause for rescinding a contract induced by it; if not, it is a cause of rescission only under certain conditions, which the definitions of s. 18 are intended to express. There are, however, forms of fraud which do not at first sight appear to include any misrepresentation of fact, and sub-ss. 3, 4, and 5 are intended to cover these. With regard to a promise made without any intention of performing it (sub-s. 3), it is not very difficult to say that a promise, though it is not merely a representation of the promisor's intention to perform it, includes a representation to that effect. Some promises are given more readily and willingly than others; but we accept promises only because we believe them to be made in good faith and no one would be content with a promise which he believed the promisor to have no intention of keeping. Similarly it is fraud to obtain property, or the use of it, under a contract by professing an intention to use it for some lawful purpose when the real intention is to use it for an unlawful purpose (v). Our modern authorities have

(u) Note (t), p. 89 above.

(v) See *Feret v. Hill* (1854) 15 C. B. 207; 100 R. R. 318, which, admitting this, decided that the defrauded party,

having given possession, is not entitled to resume it by force without process of law.

8. 17. removed the difficulty which used to be felt in treating the statement of a man's intention as a representation of fact. "There must be a misstatement of an existing fact, but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else." Accordingly it is fraud to obtain a loan of money by misrepresenting the purposes for which the money is wanted, even if there is nothing unlawful in the subject for which the money is actually wanted and used (*w*). In particular, it is well settled in England that buying goods with the intention of not paying the price is a fraud which entitles the seller to rescind the contract (*x*). On the whole, then, sub-s. 3 of the present section did not introduce any novelty (*y*).

Sub-s. 4.—The mention of "any other act fitted to deceive" in sub-s. 4 appears to be inserted merely for the sake of abundant caution.

Acts and omissions specially declared to be fraudulent.—Sub-s. 5 applies to cases in which the disclosure of certain kinds of facts is expressly required by law, and non-compliance with the law is expressly declared to be fraud. Thus by s. 55 of the Transfer of Property Act (IV of 1882) the seller of immovable property is required to disclose to the buyer "any material defect in the property of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover," and the buyer to disclose to the seller "any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest," and "omission to make such disclosures . . . is fraudulent," and this, it seems, even if the omission be due merely to oversight. In England a similar duty of disclosure exists, and failure to fulfil it is a misrepresentation creating a right to rescind the Contract but, if not shown to be wilful, the omission would not be called fraudulent. Various dealings with property are made voidable as being

(*w*) *Edgington v. Fitzmaurice* (1885) *parte* *Whittaker* (1875) L. R. 10 Ch. at 29 Ch. Div. 459, 480, 483, per Bowen, p. 449.

L.J.

(*y*) Borrowing money with no intention of repaying it is cheating under the

(*x*) *Clough v. L. & N. W. R. Co.* (1871) L. R. 7 Ex. 21, in Ex. Ch.; *Ex-*

Penal Code : s. 416, illustration (f).

fraudulent, or declared to be fraudulent as against the transferor's creditors or assignees, by other enactments. But, as these transfers of property cannot well be employed as inducements to any other party to enter into any contract beyond such agreement as is involved in the fraudulent transfer itself, they do not come within the scope of the Contract Act, and we have no occasion to dwell upon them here (z).

Mere non-disclosure.—There are special duties of disclosure (of which we have just seen an instance) in particular classes of contracts, (a) but there is no general duty to disclose facts which are or might be equally within the means of knowledge of both parties. Silence as to such facts, as the Explanation to the present section lays down, is not fraudulent. There is a well-known American case on this point arising out of the conclusion of peace between Great Britain and the United States after the war commonly known as the war of 1812. The contract was for the sale of tobacco: the buyer knew, but the seller did not, that peace had been made; and on the seller, asking if there was any news affecting the market price, the buyer gave no answer. The Supreme Court of the United States held that there was nothing fraudulent in his silence (b). But there are at least two practical qualifications of this rule. First, the suppression of part of the known facts may make the statement of the rest, though literally true so far as it goes, as misleading as an actual falsehood. In such a case the statement is really false in substance, and the wilful suppression which makes it so is fraudulent (c). Secondly, a duty to disclose particular defects in goods sold, or the like, may be imposed by trade usage. In such a case omission to mention a defect of that kind is equivalent to express assertion that it does not exist (d). The illustrations will now be easily understood. We are not aware of any English authorities corresponding to (b) and (c).

(z) See Transfer of Property Act, s. 53 (transfers in fraud of other transferees or of creditors); Presidency Town Insolvency Act, 1900, s. 56; Provincial Insolvency Act, 1907, s. 37; *Manmohan-das v. Macleod* (1902) 26 Bom. 765.

(a) *E.g.*, Contract of fire Insurance: *Imperial Pressing Co. v. British Crown Assurance Corporation* (1913) 41 Cal. 581. See also s. 143 below.

(b) *Laidlaw v. Organ* (1817) 2 Wheat 178.

(c) *Peek v. Gurney* (1873) L. R. 6 H. L. 392, 403.

(d) *Jones v. Bowden* (1813) 4 Taunt. 847; 14 R. R. 683.

S. 18.

18.—“ Misrepresentation ” means and includes—

“ Misrepresentation ” defined.

- (1) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believed it to be true ;
- (2) any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him ;
- (3) causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

Language of the Section.—This is one of the sections taken wholly or in part from the draft Civil Code of New York, and it is one of the least satisfactory in point of form. In sub-s. 1 the use of the word “warranted” in a sense (whatever that sense may precisely be) unknown to the law, and in a subject-matter where the words “warranty” and “condition” have already caused quite enough trouble, is an elementary fault. Nor is the intention of the qualifying clause, to which we shall return, altogether clear. However, the Contract Act has at least made some improvement on the classification of the New York draft, where the original of this clause stands under the head of Fraud. Sub-s. 2 is obscure and apparently useless. Sub-s. 3 (which does not occur in the New York draft Code) seems to involve confusion between contracts voidable because consent was obtained by misrepresentation and transactions which can have no legal effect, except possibly by way of estoppel, because there was no real consent at all.

Principles of English law as to misrepresentation.—The Common Law recognises a general duty not to make statements which are in fact untrue, with the intent that a person to whom they are made shall act upon them to the damage of a person so acting, and without any belief that they are true. The breach of this duty is the civil wrong known as fraud or deceit. But, if belief is there, it is not required by any general rule of law to be founded on any reasonable ground, though want of any reasonable ground may be evidence of want of belief (e).

(e) *Derry v. Peek* (1889) 14 App. Ca. 337. Such is the law settled for England by the House of Lords. It is by no means clear that the common law is generally so understood in other jurisdictions.

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Nor is there any universal duty to give correct information, except so far as a partial statement of the truth may be rendered substantially false by omission of known facts (pp. 116, 117, above), or to give any information at all. With regard to contracts, the general principle is that if one party has induced the other to enter into a contract by misrepresenting, though innocently, any material fact specially within his own knowledge, the party misled can avoid the contract. We do not know of any positive authority for extending such a rule, even in equity, to matters of fact equally within the means of knowledge of both parties; but reliance on the other party's statement in such matters is not common or easily proved, and it is certainly convenient to state the law in the broad form that "a false representation by one party in regard to a material fact made for the purpose of inducing the other party to enter into a contract, and actually inducing the latter to enter into the contract, renders the contract voidable" (*f*). If this can be accepted as the rule of the modern Common Law, the Contract Act does not go beyond it, if indeed it goes so far. The qualifying words of the Act will be considered below. In certain classes of contracts, where the facts are specially within one party's knowledge, a positive duty of disclosure is added, and the contract is made voidable by mere passive failure to communicate a material fact. The principal examples of this special duty are to be found in the several branches of the contract of insurance, and in sales of immovable property (*cp.* p. 116, above). But there is no positive duty of disclosure between contracting parties where the facts are not by their nature more accessible to one than to the other, though one party may have acquired information which he knows that the other has not (*g*).

(*f*) *Harriman*, s. 426; *cp.* *Anson*, 14th ed. 188 sqq. I cannot precisely agree with Sir W. Anson's historical view of the rules of equity in England, but this is not material in India.

(*g*) *Laidlaw v. Organ*, 2 Wheat. 98 (p. 117, above). "The question in this case is whether the intelligence of extrinsic circumstances which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have

been communicated by him to the vendor. The Court is of opinion that he was not bound to communicate it. It would be difficult to circumscribe the contrary doctrine within proper limits where the means of intelligence are equally accessible to both parties. But at the same time each party must take care not to say or do anything tending to impose upon the other": per Marshall C.J., at p. 195. For a recent example see *Turner v. Green* [1895] 2 Ch 205.

5. 18. In the same way parties are not bound to remove mistakes to which they have not contributed (*h*). It must be remembered that the parties can always decide beforehand for themselves, if they choose, what facts shall be deemed material and to what extent. On the one hand, they can make the existence of any specified state of facts, or the truth of any affirmation, an essential term or condition of the contract, so that without it there is no contract at all (*i*); on the other hand, they can make any fact or affirmation the subject-matter of a warranty or collateral agreement, so that failure to make it good shall not avoid the principal contract, but only give a right to damages. This is exemplified by the ordinary warranties expressed or implied, on a sale of specific chattels (*j*). In every case the question is what the parties really intended. Much perplexity would have been avoided if this principle, explicitly recognised only in the second half of the nineteenth century (*k*), had been understood earlier.

Sub-s. 1.—What is meant by “the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true”? Many persons would say that, in any ordinary use of the English language, the assertion of that which is not true, though it may be innocent and even free from negligence, cannot be “warranted” in any manner. Now the framers of the New York Civil Code put this clause under the head of Fraud. Probably what they meant was that a misrepresentation made with reasonable and probable cause for believing it true should in no case be treated as fraud but that a reckless or grossly negligent misrepresentation should be. The result would be to lay down a more stringent rule as to fraud than is sanctioned by English decisions—in fact, some such rule as the Court of Appeal laid down in England, but the House of Lords refused to adopt, in *Derry v. Peek* (*l*). When this clause is transferred to the head of misrepresentation, it would seem to mean that innocent misrepresentation does not give cause for avoiding a contract unless the repre-

(*h*) *Smith v. Hughes* (1871) L. R. 6 being free from treatment with sulphur).
Q. B. 597.

(*i*) *Behn v. Burness* (1863) 3 B. & S. (109—118) in the chapter on the Sale
751 (ship described in charter-party as of Goods, below.

“now in the port of Amsterdam”; (*k*) See note (*i*).

Bannerman v. White (1861) 10 C. B. (*l*) 14 App. Ca. 337, reversing judg-
N. S. 1844 (hops bought on terms of ment of C. A., 37 Ch. Div. 541.

sentation is made without any reasonable ground. The High Court of Calcutta, in a case not officially reported, has held that an assertion cannot be said to be "warranted" for the present purpose where it is based upon mere hearsay. Thus if A. makes a positive statement to B. that C. would be a director of a company about to be formed, and B. applies for shares on the faith of that statement, the statement would be a misrepresentation if A. did not derive the information from C. direct, but from a third party, D. (m). In the course of the judgment Maclean, C.J., said: "I need scarcely say that we must deal with this case according to the law of India and not of England, and if we find the term 'misrepresentation' defined by statute in this country, we must do our best to ascertain whether the case is brought within that statutory definition . . . [A.] says that [D.] told him that he [D.] had authority from [C.] to use his name in the prospectus as a director, in other words, that he [A.] obtained his information not from [C.] direct, but only through [D.]. I am not disposed to think that if [A.] had relied on the second-hand information he derived from [D.], he was 'warranted' in making the positive assertion that [C.] would be a director" (n). This appears to require, on the part of the person making the representation, a belief not merely having some reasonable ground—for it is often quite reasonable to act upon second-hand information, even when it is not unavoidable—but founded on the best information that is available. There is no reason to be dissatisfied with this judgment, though it may be matter of historical doubt whether the framers of the Act intended to go so far. The qualification does not, of course, apply to the classes of contracts where there is a special duty to disclose all material facts within a party's knowledge. Outside these contracts of "abundant good faith" the rule of the High Court of Calcutta sets up a standard of diligence which may well be thought adequate; though it would not satisfy those learned writers in England and America who take the view that "innocent misrepresentation which brings about a contract is now a ground for setting the contract aside" (o) in all cases.

We may refer to a Punjab case to illustrate the meaning of the expression "positive assertion." A. sells a mare to B. Before the

(m) *Mohun Lall v. Sri Gungaji Cotton Mills Co.* (1899) 4 C. W. N. 369.

(n) *Ibid.* (n.) 388.

(o) Anson, 188; Harriman, cited p. 119, above.

- s. 18.** sale A. writes to B. as follows, in answer to inquiries from B.: "I think your queries would be satisfactorily answered by a friend if you have one in the station, and I shall feel more satisfied. All I can say is that the mare is thoroughly sound." The letter is a "positive assertion" of soundness coupled with a recommendation to B. to satisfy himself before purchasing; but it does not amount to a warranty (*p*).

Sub-s. 2.—This sub-section is, as already stated, obscure (*q*). It was considered in a Bombay case (*r*) by Sargent, J.: "The second clause of s. 18 is probably intended to meet all those cases which are called in the Courts of Equity, perhaps unfortunately so, cases of 'constructive fraud' (*s*), in which there is no intention to deceive, but where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud or deceit." In that case the plaintiffs, who were creditors of the defendants, sued to set aside a composition deed executed by their agents, alleging that their signature was obtained by a representation made by one of the defendants that the deed was nothing more than an assignment to trustees for the benefit of creditors, as agreed to in a previous meeting of the creditors. It was further alleged that the deed contained a release of which no mention was made at the meeting, and of which the plaintiffs' agents had no knowledge. Under those circumstances the High Court of Bombay declared the release absolutely void, on the ground that the deed as it was signed was essentially different from that which the plaintiffs' agents intended to execute, or thought they were executing, when they affixed their signature to the deed. The Court went further, and said that there was another ground on which the plaintiffs were entitled to relief, namely, that there was a duty on the part of the defendants within the meaning of the present sub-section to

(*p*) *Currie v. Rennick* (1886) Punj. Rec. No. 41.

(*q*) The framers of the New York draft Code seem to have extracted this rule from *Bulkley v. Wilford* (1834) 2 Cl. & F. 102; 37 R. R. 39, which really proceeded on the much more intelligible principle that an agent who is bound to

be skilled shall not profit by his own incompetence.

(*r*) *Oriental Bank Corporation v. Fleming* (1879) 3 Bom. 242, 267; see this case cited in the commentary on s. 13 at p. 85 *supra*.

(*s*) This term has been obsolete for many years in English practice.

communicate to the plaintiffs' agents the fact of the existence of the release, and that the breach thereof entitled the plaintiffs to avoid the transaction under s. 19 of the Act. But it is submitted that the first sub-section was more applicable, as there was a "positive assertion" by one of the defendants that the documents was nothing more than a mere assignment of the creditors' property to trustees. 8. 18.

Sub-s. 3.—This sub-section was applied in a Bomhay case (t), where it was held that though a company was not liable as drawer on a bill of exchange signed by two of the directors and the secretary, treasurer, and agent of the company, yet it was liable to the bank to which the bill was sold as for money received by the company to the use of the bank. The decision proceeded on the ground that the directors, while acting within the scope of their authority, had sold the bill as one on which the company was liable, but upon which, having regard to the form in which it was drawn, the company could not be rendered liable, and the directors were, therefore, guilty of misrepresentation within the meaning of the present sub-section. The case was no doubt within the terms of the Act, but it might have been decided on the broader ground that a buyer "is entitled to have an article answering the description of that which he bought," and that here the document which the bank had bought had not the force or value which it purported and was supposed to have. Thus it might be regarded as a case of common mistake under s. 20 of the Act, entitling the party who had paid money to recover it under s. 72. In *The Oceanic Steam Navigation Co. v. Soonderdas Dhurumsey* (u) the defendants in Bomhay chartered a ship wholly unknown to them from the plaintiffs, which was described in the charter-party, and was represented to them, as being not more than 2,800 tonnage register. It turned out that the registered tonnage was 3,045 tons. The defendants refused to accept the ship in fulfilment of the charter-party, and it was held that they were entitled to avoid the charter-party by reason of the erroneous statement as to tonnage. It is difficult to see how the Court, having regard to the terms of the Act and to the evidence of the usage of Bomhay and the understanding of the parties in the particular case, could have decided otherwise.

(t) *In re Nursey Spinning and Weaving Co., Ltd.* (1880) 5 Bom. 92.

(u) (1890) 14 Bom. 241.

- 18, 19. But this case does not necessarily lay down any rule that an error in stating the amount of tonnage will in general render a charter-party voidable. In England such a statement does not, in the absence of special circumstances, amount even to a warranty (*v*). As further illustrating the rule laid down in the present sub-section we might cite an earlier case, where it was held by the Allahabad Court that an agreement by the defendant to sell and deliver a boiler to the plaintiff at Rajghat was voidable at the option of the defendant, the plaintiff having represented (though innocently) to the defendant that there was a practicable road all the way, while, as a matter of fact, there was at one point a suspension bridge not capable of bearing the weight of the boiler (*w*).

Misrepresentation of fact or law.—It used to be said in English books that misrepresentation which renders a contract voidable must be of fact; but there does not seem to be really any dogmatic rule as to representations of law. The question would seem on principle to be whether the assertion in question was a mere statement of opinion or a positive assurance—especially if it came from a person better qualified to know—that the law is so and so. It seems probable in England, and there is no doubt here, that at any rate deliberate misrepresentation in matter of law is a cause for avoiding a contract. Where a clause of re-entry contained in a *kabuliyat* (counterpart of a lease) was represented by a zamindar's agent as a mere penalty clause, the Judicial Committee held that the misrepresentation was such as vitiated the contract, and the zamindar's suit was dismissed (*x*).

- 19.—When consent to an agreement is caused by coercion (*y*), fraud, or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Voidability of
agreements with-
out free consent.

(*v*) *Barker v. Windle* (1856) 6 E. & B. 675; 106 R. R. 762.

(*w*) *Johnson v. Crowe* (1874) 6 N.W. P. 350. In fact, the agreement was made several months before the Contract Act came into operation, but the case was treated at every stage as if it fell within the Act. The same result might have been arrived at on the ground that the existence of a practicable road all

the way was an essential term of condition of the contract. *Cp. Pollock, Law of Fraud in British India*, p. 101.

(*x*) *Pertap Chunder v. Mohendranath Purkhait* (1889) 17 Cal. 291; L. R. 16 Ind. Ap. 233.

(*y*) In s. 19, the words "undue influence" have here been omitted, being repealed by the Indian Contract Act Amendment Act VI of 1899, s. 3.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true. §. 19.

Exception.—If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations.

(a) A., intending to deceive B., falsely represents that 500 maunds of indigo are made annually at A.'s factory, and thereby induces B. to buy the factory. The contract is voidable at the option of B.

(b) A., by a misrepresentation, leads B. erroneously to believe that 500 maunds of indigo are made annually at A.'s factory. B. examines the accounts of the factory, which show that only 400 maunds of indigo have been made. After this B. buys the factory. The contract is not voidable on account of A.'s misrepresentation.

(c) A. fraudulently informs B. that A.'s estate is free from encumbrance. B. thereupon buys the estate. The estate is subject to a mortgage. B. may either avoid the Contract, or may insist on its being carried out, and the mortgage debt redeemed (z).

(d) B., having discovered a vein of ore on the estate of A., adopts means to conceal, and does conceal, the existence of the ore from A. Through A.'s ignorance B. is enabled to buy the estate at an under-value. The contract is voidable at the option of A.

(e) A. is entitled to succeed to an estate at the death of B.; B. dies; C., having received intelligence of B.'s death, prevents the intelligence reaching A., and thus induces A. to sell him his interest in the estate. The sale is voidable at the option of A.

(z) Under the Transfer of Property Act IV of 1882, s. 55 (g), the seller, is bound to discharge the encumbrance, independently of any question of fraud, not having sold subject to encumbrances,

S. 19. **Scope of the section.**—The section states the legal effect of coercion, fraud, and misrepresentation, in rendering contracts procured by them voidable (a); the foregoing sections have only laid down their respective definitions. Perhaps the most important parts of the section, certainly those which need the most careful attention, are the exception and the explanation. These mark, though hardly with practical completeness, the limits within which the rule is applied. Before considering them we have to pause on the second paragraph of the body of the section. It reads plainly enough at first sight, but the thought does not seem to be really clear. The party entitled to set aside a voidable contract may affirm it if he thinks fit. That is involved in the conception of a contract being voidable. And if he affirms it, he may require the performance of the whole and every part of it (subject to the performance in due order of whatever may have to be performed on his own part) or, in default thereof, damages for non-performance (subject to special causes of excuse, if any, which we are not now considering). If, as may well be the case, the default is wholly or partly due to the non-existence of facts which the defaulting party represented as existing, this party can obviously not set up the untruth of his own statement by way of defence or mitigation; and, if the case is a proper one for specific performance, and if it is in his power to perform the contract fully, though with much greater cost and trouble than if his statement had been originally true, he will have to perform it accordingly (b). Is anything more than this meant by the declaration of the affirming party's right to "be put in the position in which he would have been if the representations made had been true"? (c). There are obviously many cases in which such restitution is not literally possible. Thus, if the owner of an estate subject

(a) Fraud in the performance of a contract is no ground for rescission: *Jumsetji v. Hirjibhai* (1913) 17 Bom. L. R. 158 at p. 169.

(b) See the Specific Relief Act, s. 18.

(c) The Indian Law Commissioners' draft was curiously worded (cl. 6): "A person who, either knowingly, or ignorantly, makes a false representation whereby he induces another to enter into a contract with him, is bound to place

the other in the same position as if the representation had been true, and in default of his doing so the contract is voidable at the option of the person who has been misled." This, literally read, says that the contract is voidable only if the representation, besides having been untrue when made, cannot be subsequently made good. Such a restriction of the misled party's rights is, we believe, unknown to the law.

to a lease for an unexpired term contracts to sell it to a purchaser who requires immediate possession, and conceals the existence of the lease (d), the purchaser cannot be put in the same position as if the representation that there was no tenancy, or only such a tenancy as could be determined at will, had been true. Cases may occur, on the other hand, where a seller of land has held out, though not in express terms or wilfully, an element of attractiveness or security in the property offered for sale which it is in his power to realise by some act or undertaking on or with regard to adjoining property of his own. In such a case there is English authority for saying that he can enforce the contracts only on the terms of making good what he has represented (e). But it is dangerous to formulate general propositions in the law of contract from decisions in suits for the specific performance of contracts relating to land, and it is not clear that the facts of the decision in question are not reducible to misrepresentation or an ambiguous offer. Nor is it certain that the present enactment can always be literally relied on. A. sells a house to B., and by some blunder of A.'s agent the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According to the letter of the present paragraph, B. may insist on completing the contract and on having the difference between the actual and the stated value paid to him and his successors in title by A. and A.'s successors in title for all time. Nothing short of that will put him "in the position in which he would have been if the representations made had been true." This is obviously not the intention of the enactment.

There is an important class of cases in which, although there is no such misrepresentation as to make the contract voidable, complete performance is, by reason of misdescription or otherwise, unattainable, and specific performance will be decreed subject to compensation for the defect. It was originally proposed to deal with such cases in the Contract Act. The enactment governing them is now to be found in the Specific Relief Act, s. 14, see the comments thereon below.

Exception : Means of discovering truth.—The exception is wider—we must suppose deliberately so—than the corresponding English

(d) *Morgan v. Government of Haidra-*
bad (1888) 11 Mad. 419.

(e) *Baskcomb v. Beckwith* (1869)

L. R. 8 Eq. 100. See further on s. 18 of
Specific Relief Act below.

8. 19. authorities. In England the principle is that if a man makes a positive statement to another, intending it to be relied on, he must not complain that the other need not have relied upon it. "The purchaser is induced to make a less accurate examination by the representation, which he had a right to believe" (f). The test is not whether the party might have inquired for himself but whether he did inquire and trust his own inquiries rather than the representation (g); and so far is this doctrine from being confined to cases of actual fraud that there is no decisive or recent authority for not applying it even to cases where the misrepresentation consists only in failing to disclose some fact which ought to be disclosed. No doubt there may be a question whether the party alleged to have misrepresented a fact really said, "I tell you it is so," or only "I think you will find it so." This question will, according to the circumstances, be of the construction of particular words, or of the inferences to be drawn from words and conduct. Again, the possession of obvious means of knowledge may lead, in some cases, to a fair inference that those means were used and relied on. But still the real point to be considered is whether the party misled did put his trust in the representation made to him of which he complains, or in other information of his own. In the latter case the misrepresentation did not really cause his consent. In other words, the present Exception, so far as allowed by English law, is logically nothing but a branch of the following Explanation. However, the words of the Exception are perfectly clear. If, as seems not altogether improbable (h), they were not intended to alter the English rule, they were chosen with singular infelicity. It will be observed that the Exception does not apply to cases of active fraud as distinguished from misrepresentation which is not fraudulent (i). A vendor of a house and land knew that

(f) *Dyer v. Hargrave* (1805) 10 Ves. 505, 510; 8 R. R. at p. 39.

(g) *Redgrave v. Hurd* (1881) 20 Ch. Div. 1.

(h) At least the reading out of conditions of sale in English does not constitute means of discovering the truth for a buyer who does not understand English, and such a buyer at a sale under the direction of the Court is en-

titled to rely on statements made by the auctioneer in the presence and hearing of the chief clerk in charge: *Mahomed Kala Mea v. Harperink* (1908) 36 Cal. 323; L. R. 36 Ind. Ap. 32. See also *Rustomji v. Vinayak* (1910) 35 Bom. 29, at p. 34.

(i) See *Abdulla Khan v. Giridhari Lal* (1904) Punj. Rec. no. 49.

the purchaser wanted immediate possession, and, while admitting that the property was occupied by a tenant, first concealed the fact that the tenant had a lease, and then pretended that the lease was forfeited ; the purchaser was entitled to rescind the contract, although he might have ascertained by independent inquiry what the tenant's interest really was (j). S. 19.

The ordinary diligence of which the Exception speaks may be taken to be such diligence as a prudent man would consider appropriate to the matter, having regard to the importance of the transaction in itself and of the representation in question as affecting its results. A possibility of discovering the truth by inquiries involving trouble or expense out of proportion to the value of the whole subject-matter would not, it is conceived, be "means of discovering the truth with ordinary diligence." In *Re Nursey Spinning and Weaving Co. (k)*, cited at p. 123, *ante*, it was contended on behalf of the company that the exception to s. 19 was applicable to that case, and that the bank could have discovered with ordinary diligence that the company was not liable on a bill drawn by its secretary, treasurer, and agent. Sargent, J., said: "No ordinary diligence would have enabled the bank to discover that the company was not liable on this bill. The form of the bill would naturally lead the bank, as it admittedly did lead the bank to suppose that it was the company's bill as represented and the discovery could only be made by persons trained in the law and after a careful examination of legal authorities." But where a purchaser of rice stored up at a place to which he had an easy access refused to take delivery on the ground that the rice was of an inferior quality to that contracted for, it was held that he could not rescind the contract, for he could have discovered the inferiority of the quality by using "ordinary diligence" (l).

Explanation : as to "causing consent."—The principle of the caution given here is obvious. A false representation, whether fraudulent or innocent, is merely irrelevant if it has not induced the party to whom it was made to act upon it by entering into a contract

(j) *Morgan v. Government of Haidarabad* (1888) 11 Mad. 419, 439. See also *Jogendra Nath v. Chandra Kumar* (1915) 42 Cal. 28, at p. 34.

(k) (1880) 5 Bom. 92.

(l) *Shoshi Mohun Pal v. Nobo Kristo* (1878) 4 Cal. 801.

8. 19. or otherwise. He cannot complain of having been misled by a statement which did not lead him at all. In the common phrase of English text-books, the representation must be definable as *dans locum contractui*, bringing about the contract. Hence an attempt to deceive which has not in fact deceived the party can have no legal effect on the contract, not because it is not wrong in the eye of the law, but because there is no damage. This rule is applicable where a seller of specific goods purposely conceals a fault by some contrivance, in order that the buyer may not discover it if he inspect the goods, but the buyer does not in fact make any inspection (*m*). "Deceit which does not affect conduct cannot create liabilities" (*n*). In particular cases it may be hard to determine whether a certain representation was in fact relied upon so that it can be said to have caused consent to the contract. This question, where it arises, is a question not of law, but of fact (*o*), on which the character of the statement made and the probability that it would influence a reasonable man's determination may be taken into account. "If it is proved that the defendants with a view to induce the plaintiff (*p*) to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, and it is proved that the plaintiff did enter into the contract, it is a fair inference of fact that he was induced to do so by the statement. . . . Its weight as evidence must greatly depend upon the degree to which the action of the plaintiff was likely, and on the absence of all other grounds on which the plaintiff might act" (*q*). There is no rule of law that any particular kind of statement is necessarily material in some cases and immaterial in others. In general one man's money is as good as another's, and in a contract of loan the lender's personality is indifferent to the borrower; but where a money-lender who has acquired an evil repute for hard dealing in his own name advertises and lends money in assumed names, it is a permissible inference of fact that

(*m*) *Horsfall v. Thomas* (1862) 1 H. & C. 90; 130 R. R. 394.

(*n*) Anson, p. 212.

(*o*) *Currie v. Rennick* (1886) Punj. Rec. no. 41.

(*p*) Of course the positions of the party having made the statement and the party to whom it was made, as

plaintiff and defendant, will depend on the form in which each case comes before the Court: the suit may be to enforce or to rescind the contract, or (as in the case now cited) to recover damages for the wrong of deceit.

(*q*) *Smith v. Chadwick* (1884) 9 App. Ca. 187, 196 (Lord Blackburn).

the concealment of his identity was a fraud inducing the borrower **Ss. 19, 19A** to contract with him (r). The fact that a person has taken pains to falsify or conceal a fact is cogent evidence that to him at any rate that fact appeared material, and the falsification or concealment an important condition of obtaining the other party's consent. A man who has so acted cannot afterwards turn round and say, "It could have made no difference if you had known the truth."

Illustrations.—There is nothing calling for particular comment in the illustrations to this section, except that the case put in illustration (c) would now be more simply disposed of under the specific provisions of the Transfer of Property Act ; see the note on it above.

Rescission of voidable contracts.—As to the consequences of the rescission of voidable contracts, see s. 64.

Specific Performance.—As to the effect of fraud and misrepresentation on the rights of a party to claim or resist specific performance, see Specific Relief Act I of 1877, ss. 26 (a), (b), (c), 28 (b), 31, and 35 (a).

Right of third party cannot be set up.—It is no defence to an apparently regular claim to property to suggest, without showing any title of one's own, that the original transaction from which the claimant's title is derived may have been voidable under this or the following section (s).

19A.—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Power to set aside contract induced by undue influence.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

Illustrations.

(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(r) *Gordon v. Street* [1899] 2 Q. B. 641, C. A. *Shamray* (1911) 36 Bom. 37. This would be too elementary to call for decision or report in England.

(s) *Trimbak Bhikaji v. Shankar*

S. 19A.

(b) A., a money-lender, advances Rs. 100 to B., an agriculturist, and, by undue influence, induces B. to execute a bond for Rs. 200 with interest at 6 per cent. per month. The Court may set the bond aside, ordering B. to repay the Rs. 100 with such interest as may seem just.

This section appears to be intended to give express sanction to the constant practice of Indian as well as English Courts in cases of unconscionable money-lending, namely, to relieve the borrower against the oppressive terms of his contract, but subject to the repayment to the lender of the money actually advanced with reasonable interest (t). (See the illustrations.) The rate of interest allowed by the High Courts as reasonable has varied, according to circumstances, from 6 and 12 per cent. in Bengal to 24 per cent. in Bombay and the North-West Provinces (u). See notes to s. 16, "unconscionable bargains", p. 107 above.

The second paragraph is the only portion of the section that is new. However, as it stands it is virtually a reproduction of ss. 35 and 38 of the Specific Relief Act. The combined effect of those two sections is that a contract in writing may be rescinded at the suit of a party when (amongst other causes) it is voidable, but that the Court may require the party rescinding to make any compensation to the other which justice may require. It may be noted that under the present section the contract need not be in writing. See also s. 64 below which leaves no discretion to the Court in the matter of restitution.

The Select Committee gave the following reason for adding this section to the Act:—

"We have recast the language of the new s. 19A of the Act of 1872 proposed by cl. 3 of the Bill, so as to bring it more closely into accord

(t) Cited with approval in *Poma Dongra v. William Gillespie* (1907) 31 Bom. 348, at p. 352.

(u) *Mothoormokun Roy v. Soorendro Narain Deb* (1875) 1 Cal. 108; *Mackintosh v. Hunt* (1877) 2 Cal. 202; *Chunni Kuar v. Rup Singh* (1888) 11 All. 57; affirmed in appeal *sub nom. Raja Mohkum Singh v. Raja Rup Singh* (1893) 15 All. 352; L. R. 20 Ind. Ap. 127 (where 20 per cent. was allowed); *Dhanipal Das v. Maneshar Bakhsh Singh* (1906) 23 All.

576; L. R. 33 Ind. Ap. 118; *Maneshar Bakhsh Singh v. Shadi Lal* (1909) 31 All. 386; L. R. 36 Ind. Ap. 96 (where 18 per cent. was allowed); *Balkishan Das v. Madan Lal* (1907) 29 All. 303 (where 24 per cent. was allowed); *Poma Dongra v. William Gillespie* (1907) 31 Bom. 348 (where 24 per cent. was allowed); *Rannee Annapurni v. Swaminathus* (1910) 34 Mad. 7 (where 24 per cent. was allowed).

with the language of s. 19. A contract obtained by undue influence is **Sa. 19A, 2** on a different footing from a contract obtained by fraud. In the case of the latter a party who, with knowledge of the fraud, has taken any benefit under the contract, is held to have elected to affirm it; but where a contract has been obtained through the exercise of undue influence it is necessary that the Court should have power to relieve the party who acted under the undue influence, even although he may have received some benefit under the contract. On the other hand where such benefit has been received the Court ought to have full power to impose such conditions as may be just upon the party seeking relief."

20.—Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation.—An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

Agreement void where both parties are under a mistake as to matter of fact.

Illustrations.

(a) A. agrees to sell to B. a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away, and the goods lost. Neither party was aware of these facts. The agreement is void. [*Couturier v. Hastie* (1856) 5 H. L. C. 673; 101 R. R. 329.]

(b) A. agrees to buy from B. a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void. [*Pothier, Contrat de Vente*, cited 5 H. L. C. 678; so in modern French Law, Code Civ. 1601. For Roman example see Pollock on Contract, 8th ed. 519.]

(c) A., being entitled to an estate for the life of B., agrees to sell it to C. B. was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void. [*Strickland v. Turner* (1852) 7 Ex. 208; 86 R. R. 619; *Cochrane v. Willis* (1865) L. R. 1 Ch. 58.]

Scope of the section.—The practical scope of this section is shown (though not completely) by the illustrations. No doubt is possible as to the actual solution, in any civilised system of jurisprudence, of the cases put. But the wording of the section (which follows the Indian Law Commissioners' original draft) tends to obscure the principle which governs them. It is not that the mistake has any special

8. 20. operation because it is a mistake, but that the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turns out not to have existed at the date of the agreement. Where the contract was for the sale of an object not existing, or which had ceased to exist according to the description by which it was contracted for, the result is still more easily apprehended if we say that there was nothing to buy and sell.

Indian decisions have furnished a few more illustrations. The section will no doubt continue to be interpreted, as occasion arises largely and beneficially.

The mistake must be as to an existing fact.—The mistake must be “as to a matter of fact *essential* to the agreement.” It is not enough that there was an error “as to some point, even though a material point, an error as to which does not affect the substance of the whole consideration” (v). The circumstance, therefore, that neither the lessor nor the lessee supposed at the date of the lease that the Government assessment would ever be increased will not avail the lessor to avoid the lease if the assessment is subsequently enhanced (w). “The circumstance that both the parties to the lease supposed that the assessment would never be increased did not prevent their united will from forming a contract, any more than from making the terms of the contract, when thus concluded, from being binding, in spite of any future change of circumstances” (x). As observed by the Judicial Committee in *Peria Sami v. Representatives of Salugar*, “the grant, whatever its effect, was not necessarily avoided because subsequent events disappointed the expectation in which it was made” (y). But where a settlement was entered into between Government and certain *inamdars* in respect of a village whereby the latter agreed to pay a certain yearly quit-rent, and both parties believed that the *inamdars* were the superior holders of all the lands in the village, it was held that the settlement was void as regards a portion of the lands which subsequently turned out to be *wanta* lands held by certain *girassias* as owners in possession (z).

(v) Per Blackburn, J., in *Kennedy v. Panama Mail Co.* (1867) L. R. 2 Q. B. 580, 588.

(w) *Babshetti v. Venkataramana* (1879) 3 Bom. 154.

(x) *Ibid.*, p. 158.

(y) (1878) L. R. 5 Ind. Ap. 61, at p. 73.

(z) *Secretary of State for India v. Sheth Jeshingbhai* (1892) 17 Bom. 407.

Upon the same principles a compromise of a suit will be set aside if it was brought about under a mistake as to the subject-matter of the agreement (a). The view thus expressed is confirmed by later English cases. Not only a compromise (b), but an order of the Court made by consent (c), may be set aside if the arrangement was entered into even under a one-sided mistake of counsel to which the other party, however innocently, contributed, or even otherwise if the mistake was such as to prevent any real agreement from being formed. *A fortiori* it is so in the case of the mistake being common to both parties (d). The existence of a separate warranty in a contract of sale is evidence that the matter of the warranty is not an "essential" part of the contract. In such case, if there is a breach of the warranty, the purchaser is only entitled to compensation for the breach, and the sale is not even voidable. It is still a stronger case where not only no warranty is given by the vendor, but the purchaser buys "subject to all defects." Thus, where a mortgagee sold his claim under the mortgage subject in effect to all defects, and it was subsequently discovered that the mortgage was inoperative, as it was attested by only one witness, it was held that, though both parties were ignorant of that fact at the time of the assignment, the purchaser was not entitled to rescind the contract and claim back the purchase-money, the purchase having been made subject to all defects (e). An administration bond given under s. 256 of the Indian Succession Act, 1865, is not void under this section, though the party to whom the grant of letters of administration is made may have obtained the grant by fraud upon the Court, and though neither the sureties nor the Court to which the bond is passed were aware of the fraud when the grant was made. It was so held by the majority of the High Court of Calcutta in a recent case. In that case letters of administration of the estate of a deceased person were granted to A. on execution of a bond by him and two sureties engaging for the due administration of the estate. It was subsequently discovered that A. was not entitled to the grant, and that he had obtained it by false and fraudulent representations made in his

S. 20.

(a) *Bibee Solomon v. Abdool Azeez* Ch. 534.
(1881) 6 Cal. 687, 706.

(b) *Hickman v. Berens* [1895] 2 Ch.
638.

(c) *Wilding v. Sanderson* [1897] 2

(d) *Huddersfield Banking Co. v. H. Lister & Son* [1895] 2 Ch. 273.

(e) *Sada Kassar v. Tadepally* (1907)
30 Mad. 284.

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S. 20. petition for letters of administration. The grant to A. was thereupon revoked, and a suit was brought against the sureties to recover from them the amount misappropriated by A. and forming part of the estate. One of the defences raised on behalf of the sureties was that the bond was void under the present section, and that they were not therefore liable upon the bond. It was contended that both the Court and the sureties were under a mistake as to a matter of fact "essential" to the agreement, namely, that A. was entitled to letters of administration, and that the sureties would not have executed the bond but for that mistake. But this contention was overruled, and it was held by a majority of the Court that the mistake of the Court and of the sureties did not relate to the *essential* subject of the contract. The decision was also based on the ground that the liability of sureties under an administration bond did not depend on the validity or invalidity of the grant (*f*). The decision of the majority was upheld in appeal to the King in Council (*g*). The same principle has been held to apply to surety bonds under the Guardians and Wards Act VIII of 1890. Thus, where A. was appointed guardian of the property of a minor on passing a bond to the District Court executed by him and B. as surety for the due management and realisation of the minor's property, and failed to account for the income of certain property which actually belonged to the minor, but was not included in the list of properties belonging to the minor annexed to the petition for his appointment, it was held that B. was liable to make good the amount, though it might be said that both the Court and B. were led to believe by A. that the property did not belong to the minor (*h*). See also the commentary on s. 13, above.

In a recent Bombay case (*i*), A., fraudulently representing himself to be B., purported to mortgage to C. property belonging to B. C. then transferred the pretended mortgage to D. D. insisted that the mortgagor should be a party to the deed of transfer. A still personating B., joined in executing that deed as a concurring party. The

(*f*) *Debendra Nath Dutt v. Adm.-Gen.* 35 Ind. Ap. 109.

of Bengal (1906) 33 Cal. 713; see particularly pp. 739—740, 746—747, 751, and 755. (*h*) *Sarat Chandra Roy v. Rajoni Mohan Roy* (1908) 12 C. W. N. 481.

(*i*) *Ismail Alkarakhia v. Dattatraya*

(*g*) S. C. (1908) 35 Cal. 955; L. R. (1910) 40 Bom. 638.

deeds of mortgage and transfer contained the usual covenants (j). D. subsequently discovered that the mortgage and transfer deeds were not executed by B., but by A. personating him and he sued C. for return of the transfer money. It was held by the Court of first instance that D. was not entitled to a return of the transfer money. This decision was reversed on appeal, on the ground that the case was one of a mistake of fact under this section, and C. was bound under s. 65 to repay the transfer money to D. The correctness of the reversal seems doubtful. On principle D. was not entitled to recover as on a total failure of consideration: for, although the assignment passed nothing as a conveyance, it gave D. a title to the debt (for which the property was only a security) as against A., who was clearly estopped from denying his identity with B. for this purpose; and, likewise by estoppel, a right of action against him on the mortgagor's covenant for title express or implied. Moreover D., having required the supposed B.'s concurrence, had not relied on any assurance of C.'s as to the reality of the mortgage made in the name of B. The fact (as presumably it was) that A was missing or insolvent or both does not affect the legal result. Then as to the Indian Acts, it is obvious that there was no contract formed between C. and D.; but D. paid C. not under the agreement, but as consideration for an assignment made in pursuance of it, and therefore it does not appear that s. 65 of the present Act applies to this case: neither does anything in the Transfer of Property Act seem applicable.

Specific Performance.—As to the right of a party to resist specific performance of a contract on the ground of mistake, see Specific Relief Act, s. 26 (a) and (b) and s. 28 (a) below.

Rectification.—The Courts will not rectify an instrument on the ground of mistake unless it is shown that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that the contract is inaccurately represented in the instrument. Thus in a Bombay case (k) the plaintiffs chartered a steamer from the defendants to sail from Jedda on “the 10th August, 1892 (fifteen

(j) The report is not clear as to this. The judgments, as reported, are not satisfactory. *Clare v. Lamb* (1875), L. R. 10 C. P. 334, is in favour of the decision below and the opinion expressed

in the text, but might be distinguished.

(k) *Haji Abdul Rahman Alarakhia v. The Bombay and Persia Steam Navigation Co.* (1892) 16 Bom. 561.

20, 21. days after the *Hajj*," in order to convey pilgrims returning to Bombay. The plaintiffs believed that "the 10th August, 1892," corresponded with the fifteenth day after the *Hajj*, but the defendants had no belief on the subject, and contracted only with respect to the English date. The 19th July, 1892, and not the 10th August, 1892, in fact corresponded with the fifteenth day after the *Hajj*. On finding out the mistake the plaintiffs sued the defendants for rectification of the charter-party. It was held that the agreement was one for the 10th August, 1892; that the mistake was not mutual, but on the plaintiffs' part only; and, therefore, that there could be no rectification. The Court further expressed its opinion that even if both the parties were under the mistake the Court would not rectify, but only cancel, the instrument, as the agreement was one for the 10th August, 1892, and that date was a matter materially inducing the agreement. See also Specific Relief Act, s. 31 and the undermentioned case (l).

Compensation.—Note, in connection with the present section, the provision of s. 65 that when an agreement is discovered to be void any person who has received any advantage under the agreement is bound to restore it, or to make compensation for it, to the person from whom he received it.

21.—A contract is not voidable because it was caused by a mistake as to any law in force in British India : but a mistake as to a law not in force in British India has the same effect as a mistake of fact.

Effect of mistake as to law.

Illustrations.

A. and B. make a contract grounded on the erroneous belief that a particular debt is barred by the Indian law of limitation. The contract is not voidable.

A. and B. make a contract grounded on an erroneous belief as to the law regulating bills of exchange in France. The contract is voidable.

In the second illustration *voidable* is an obvious slip for *void*, which is required both by legal principle and by the express terms of s. 20. If there is really a common mistake on an essential matter

(l) *Madhavji v. Ramnath* (1906) 30 Bom. 457.

of fact, there is no contract at all, and nothing which either party can enforce. An erroneous belief can make a contract voidable only when it has been induced in one party by the fraud or misrepresentation of the other. S. 21.

The general language of the section itself represents with approximate fidelity the current doctrine of text-books down to the time when the Act was framed, namely, that relief is not given against mistake of law. However, modern authority has shown that the doctrine in question is not acceptable without rather large qualifications which, it is apprehended, Indian practitioners cannot safely neglect. Certainly mistake of law does not universally or generally invalidate transactions in which it occurs; but neither does mistake of fact. A man cannot go back upon what he has deliberately done—not to speak of excusing himself from liability for a wrongful act or offence—merely because he alleges that he acted under a misapprehension of the law. It is a citizen's business to know, by taking professional advice or otherwise, so much law as concerns him for the matters he is transacting. No other general rule is possible, as has often been observed, without offering enormous temptations to fraud. Nevertheless in England, at any rate, "it is not accurate to say that relief can never be given in respect of a mistake of law" (m); for where the mistake is so fundamental as to prevent any real agreement "upon the same thing in the same sense" (s. 13, above) from being formed it is immaterial of what kind the mistake was, or how brought about. And in India it would seem that the present section was not intended to give validity to any apparent agreement not satisfying the conditions of real consent as laid down in ss. 10 and 13. Moreover, it is to be observed that the existence of particular private rights is matter of fact, though depending on rules of law, and for most civil purposes ignorance of civil rights—a man's ignorance that he is heir to such and such property, for instance—is ignorance of fact. A man's promise to buy that which, unknown to him, already belongs to him is not to be made binding by calling his error as to the ownership a mistake of law (n). There seems to be nothing to prevent the Indian Courts from following English authority in cases of this kind

(m) *Allcard v Walker* [1896] 2 Ch. 369; (n) See *Cooper v. Phibbs*, L. R. 2 H. 381, per Stirling, J. L. 170.

8. 21. and this in fact was done in a recent Calcutta case (o). A. agreed to take a lease from B. of certain lands including mineral rights for coal mining operations; it was provided that B. should make out a good title to the property. The lease was held by B. on a tenure which was believed by both A. and B. at the date of agreement to carry with it mineral rights. A. made several payments in advance to B., but later when a decision of the Judicial Committee and a decision of the Calcutta High Court threw very grave doubts upon this understanding of the law, A. refused to carry out the agreement, and sued B. for refund of advances. It was held following the principle of *Cooper v. Phibbs* (p) that the case was one of a common mistake as to a matter of fact, and that the agreement was void under s. 20, and A. was entitled to a refund of the advances made by him (See s. 65 below).

Again, the section does not say that misrepresentation, at any rate wilful misrepresentation, of matter of law, may not be ground for avoiding a contract under s. 17 or s. 18.

As to the second clause of the section, British Indian jurisprudence has adopted the rule of the Common Law that foreign law is a matter of fact, and must be proved or admitted as such, though the strictness of the rule has been somewhat relaxed by the Evidence Act (q). Accordingly the statement or finding of any foreign law on which the Court proceeds in a given case is no more binding on the Court in any future case, even apart from the possibility of alteration in the law in question, than any other determination or assumption as to matters of fact.

The cases in which the present section has actually been applied have been fairly simple. Thus where a mortgage bond provided that if the mortgagor failed to redeem the mortgaged property within eight years the mortgagee should be the owner of the property, and the mortgagor, being unable to redeem, executed an absolute transfer

(o) *Ram Chandra v. Ganesh Chandra* (1917) 21 C. W. N. 404.

(p) See f. n. (n) above.

(q) Indian Evidence Act, s. 38: "When the Court has to form an opinion as to a law of any country any statement of such law contained in a book purport-

ing to be printed or published under the Authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings is relevant."

of the property to the mortgagee, and put him in possession, it was held that a purchaser from the mortgagor of the equity of redemption subsequent to the date of the transfer was not entitled to redeem, even though the mortgagor might have been ignorant of his right to redeem the mortgage notwithstanding the clause in the mortgage precluding him from doing so (*r*). Here there was a complete conveyance and transfer of possession from the mortgagor to the mortgagee. But if the matter had rested in contract only, and there was no transfer of the mortgaged property, the mortgagor would have been entitled to redeem the mortgage, on the principle "Once a mortgage, always a mortgage." There would have been no consideration for a promise to transfer the property to the mortgagee, and the question whether there was any mistake, and, if so, whether of fact or law, would really have been superfluous.

An erroneous belief that a widow forfeits by her remarriage the rights of an occupancy tenant under the N. W. P. Tenancy Act, to which she has succeeded on the death of her first husband as his heir, is a mistake of law, and a contract grounded on such belief is not voidable, though the mistake may be common to both the parties to the contract (*s*). Similarly, an erroneous belief that a judgment-debtor is bound by law to pay interest on the decretal amount, though no interest has been awarded by the decree, is a mistake of law, and a contract grounded on such belief is not voidable. Such a belief is not a belief as to a matter of fact essential to the agreement within the meaning of s. 20. It was so held by the Judicial Committee in *Seth Gokul Dass v. Murli* (*t*). It is difficult to reconcile with this a recent decision of the Bombay High Court where it was held that a contract founded upon the erroneous belief that a judgment-debtor is bound by law to pay interest on the decretal amount, though no interest has been awarded by the decree, was void under s. 20, as being a contract entered into under a mistake as to a matter of *fact* essential to the agreement (*u*). It was said in that case that such a mistake was "a mistake as to the private rights of the parties and as such a mistake of fact." That such a mistake is not a mistake of fact, but one of law, is

(*r*) *Vishnu Sakharan v. Kashinath* (1886) 11 Bom. 174.

(*s*) *Sabihan Bibi v. Madho Lal* (1907) All. W. N. 197.

(*t*) (1878) 3 Cal. 602; L. R. 5 Ind. Ap. 78.

(*u*) *Narayan v. Raoji* (1904) 6 Bom. L. R. 417.

§s. 21-23. abundantly clear from *Seth Gokul Dass Case* where, their Lordships said: "There was, no doubt, a mistake of *law* on the part of the defendants in supposing that execution could be issued for interest upon the amount decreed from the date of the decree to the date of realisation, no such interest having been awarded by the decree. But that mistake appears to have been common not only to the plaintiff and the defendants, but also to the [Court which made the order of attachment]" (v).

22.—A contract is not voidable merely because it was

Contract caused by caused by one of the parties to it being
mistake of one party
as to matter of fact. under a mistake as to a matter of fact.

At this day this section may seem open to the remark that it contradicts a proposition which no competent lawyer would think of asserting. But when the Act was framed it was not obviously superfluous; for strange things had been said within the foregoing ten years or thereabouts by one or two of the Judges of the Court of Chancery and lawyers practising in the Courts, as they then were, of Common Law were not expected to have any knowledge of equity, and regarded the doctrines laid down in the name of equity by Vice-Chancellors as mysteries which did not concern them.

As an illustration of the rule, *Haji Abdul Rahman Allarakhia v. The Bombay and Persia Steam Navigation Co.* (w), cited in the commentary on s. 20, p. 137, above may be referred to.

23.—The consideration or object of an agreement is

| | |
|---|---|
| What considera- tions and objects are lawful and what not. | lawful, unless— |
| | it is forbidden by law; or |
| | is of such a nature that, if permitted, it |
| | would defeat the provisions of any law; or |
| | is fraudulent; or |
| | involves or implies injury to the person or property of |
| | another; or |
| | the Court regards it as immoral, or opposed to public |
| | policy. |

(v) (1878) 3 Cal. 602, at p. 608; (w) (1892) 16 Bom. 561.

L.R. 5 Ind. Ap. 78.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. §. 23.

Illustrations.

(a) A. agrees to sell his house to B. for 10,000 rupees. Here B.'s promise to pay the sum of 10,000 rupees is the consideration for A.'s promise to sell the house, and A.'s promise to sell the house is the consideration for B.'s promise to pay the 10,000 rupees. These are lawful considerations.

(b) A. promises to pay B. 1,000 rupees at the end of six months if C. who owes that sum to B., fails to pay it. B. promises to grant time to C. accordingly. Here the promise of each party is the consideration for the promise of the other party, and they are lawful considerations.

(c) A. promises, for a certain sum paid to him by B., to make good to B. the value of his ship if it is wrecked on a certain voyage. Here A.'s promise is the consideration for B.'s payment, and B.'s payment is the consideration for A.'s promise, and these are lawful considerations.

(d) A. promises to maintain B.'s child, and B. promises to pay A. 1,000 rupees yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.

(e) A., B., and C. enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.

(f) A. promises to obtain for B. an employment in the public service, and B. promises to pay 1,000 rupees to A. The agreement is void, as the consideration for it is unlawful.

(g) A., being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B. a lease of land belonging to his principal. The agreement between A. and B. is void, as it implies a fraud by concealment by A., on his principal.

(h) A. promises B. to drop a prosecution which he has instituted against B. for robbery, and B. promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

(i) A.'s estate is sold for arrears of revenue under the provisions of an Act of the Legislature, by which the defaulter is prohibited from purchasing the estate. B., upon an understanding with A., becomes the purchaser, and agrees to convey the estate to A. upon receiving from him the price which B. has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law (x).

(j) A., who is B.'s mukhtar, promises to exercise his influence, as such, with B. in favour of C., and C. promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

(x) See *Mohan Lal v. Udai Narayan* a parallel case. (1910) 14 Cal. W. N. 1031, which is

S. 23.

(k) A. agrees to let her daughter to hire to B. for concubinage. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code.

Unlawful Objects.—By s. 10 an agreement is a contract (*i.e.* enforceable) only if it is made for a lawful consideration and with a lawful object. The present section declares what kinds of consideration and object are not lawful. Its phraseology is not happy (*y*). Properly we speak of the consideration for a promise, not the consideration of an agreement. If I agree to sell you a piece of land for Rs. 20,000, my promise to convey the land is the consideration for your promise to pay the price, and your promise to pay the price is the consideration for my promise to convey the land. There is nothing that can be called the consideration of the agreement between us as a whole. If we read “promise” for “agreement,” the text becomes clearer; and s. 2 (e) (pp. 14, 32, above), though that sub-section is itself not as clear as might be desired, appears to warrant us in doing this. See also illustration (a) to the present section.

Recently Sale, J., pointed out (what indeed seems obvious) that the word “object” in this section was not used in the same sense as “consideration,” but was used as distinguished from “consideration” and meant “purpose” or “design.” It was so observed in a case where A. had agreed to sell goods to B., and B. while in insolvent circumstances assigned the benefit of the contract to his brother-in-law C. for a *consideration* of Rs. 100, the *object* both of B. and C. being to defraud B.’s creditors. It was said that the consideration for the assignment, namely, the sum of Rs. 100, was lawful, but the object was unlawful, as it was to defeat the provisions of the Insolvency Act (z).

With regard to a consideration being forbidden by law, it is to be observed that, where the consideration is a promise, it may be forbidden in one of two distinct senses. The promise may be of something which it would be unlawful to perform; and here it is perhaps simpler to say

(y) The illustrations correspond very nearly to those framed by the Law Commissioners in the first draft, cl. 10. The text is quite different.

(z) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, 710; S. C. on appeal (1907) 34 Cal. 289.

that the object of the agreement, namely, the unlawful performance, is forbidden. Sometimes, on the other hand, although there is nothing unlawful in performing the promise, a positive rule of law, founded on reasons of general expediency, will not suffer any legal obligation to arise from a promise of that kind. So it is in the cases of wagers, and of agreements in restraint of trade outside the limited sanction given to them. In such cases we shall say that the object of the agreement is not unlawful if by "object" we mean the actual performance; but we shall say that it is unlawful if by "object" we mean the creation of an obligation to perform the things promised. This ambiguity is not cleared up by anything in the language of the Act. It does not, however, seem material for any practical purpose. S. 23.

There is another possible reason, however, for the use of the word "consideration." A man may enter into a contract lawful in itself, and perform it in such a manner or by such means as to violate some distinct requirement or prohibition of the law. By so doing he may deprive himself of any claim to recover on the other party's promise to pay for his work, and this whether the other party knew anything beforehand of his unlawful action or not. Now in an agreement by mutual promises each of the promises is, properly speaking, the consideration, and the only consideration, for the other; but in discussing the subsequent duties of the parties as to performance the word "consideration" is sometimes applied, in a loose and extended sense, to those cases where the duty of performance on the one part is, according to the original intent of the agreement, conditional on previous or simultaneous performance on the other. In this inaccurate but not uncommon sense it may be said that, when a promisor who might have performed his promise lawfully performs it unlawfully, the consideration for the reciprocal promise becomes unlawful; and the language of the Act may have been designed to cover such cases. A typical English example is *Bensley v. Bignold* (a), where a printer, having put a false imprint on a pamphlet, instead of his true name and address, as required by statute, was not allowed to recover the price of his work. It does not appear whether the defendant was a party to the falsification or not, or for what purpose it was done. Here a personal and quasi-penal

(a) (1822) 5 B. & Ald. 355; 24 R. R. 401.

5. 23. disability is imposed on the plaintiff for reasons of general policy without regard to the original character of the agreement, and with the result of conferring corresponding gain on the defendant, whose deserts may be no better in themselves. Practically it is convenient to treat these cases under the head of unlawful agreements, as the broad principles and the results are the same.

Unlawful intention, like negligence, is not presumed by the law, nor is any man expected to presume it without evidence. Therefore, if a contract can on the face of it be lawfully performed, the existence of an undisclosed intention by one party to perform it unlawfully, or use it as part of an unlawful scheme, will not disable the other party from enforcing it, at any rate by way of damages; and if the construction is doubtful, that construction which admits of a lawful performance is to be preferred. Again, if there exists or arises a legal impediment, unknown to the parties at the time of contracting, to the performance of a contract in the manner which otherwise would have been the most obvious, this will not of itself avoid the contract if it can still be substantially performed without breaking the law (b). But if both parties in fact contemplate an unlawful manner of performance, the case falls within the rule "that a contract lawful in itself is illegal if it be entered into with the object that the law should be violated" (b). A contemplated unlawful or immoral use of property (including money) to be obtained under a contract is an unlawful object within the meaning of this rule, and this whether such use is part of the bargain or not, and whether the party supplying the property is to be paid out of the profits of its unlawful use or not. If both parties know of the wrongful or immoral intention, the agreement is void; if the party who is to furnish the property does not know of it, the contract is voidable at his option when he discovers the other party's intent. This is well settled by English decisions (c).

An agreement may be rendered unlawful by its connection with a past as well as with a future unlawful transaction. Thus the giving of security for money purporting to be payable under an agreement

(b) *Waugh v. Morris* (1873) L. R. 8 1 Eq. 626. But a transfer of property Q. B. 202; see especially at pp. 207, 208. once executed in possession cannot be

(c) *E. g. Pearce v. Brooks* (1866) L. R. set aside on this ground: *Ayerst v. 1 Ex. 213*; *Smith v. White* (1866) L. R. *Jenkins* (1873) L. R. 16 Eq. 275.

whose purpose was unlawful is itself an unlawful object, even though it was not stipulated for by the original agreement (*d*). S. 23.

With regard to the tendency of an agreement to "defeat the provisions of any law," these words must be taken as limited to defeating the intention which the Legislature has expressed, or which is necessarily implied from the express terms of an Act. It is unlawful to contract to do that which it is unlawful to do; but an agreement will not be void merely because it tends to defeat some purpose ascribed to the Legislature by conjecture, or even appearing, as matter of history, from extraneous evidence, such as legislative debates or preliminary memoranda not forming part of the enactment. It is not defeating the provisions of a law to take advantage of the lack of any provision for some particular case. If the enactment as it stands is intelligible, the Court cannot assume that the omission was not intended.

An agreement entered into with a fraudulent object as a particular species of the genus of agreements contemplating or involving injury to the person or property of another. The general term "injury" means criminal or wrongful harm. Evidently there is nothing unlawful in agreeing to carry on a business lawful in itself, though the property of rivals in that business may, in a wide sense, be injured by the consequent and intended competition.

There is no department of the law in which the Courts have exercised larger powers of restraining individual freedom on grounds of general utility, and it is impossible to provide in terms for this discretion without laying down that all objects are unlawful which the Court regards as immoral or opposed to public policy. The epithet "immoral" points in legal usage, to conduct or purposes which the State, though disapproving them, is unable, or not advised, to visit with direct punishment. "Public policy" points to political, economical, or social grounds of objection, outside the common topics of morality, either to an act being done or to a promise to do it being enforced. Agreements or other acts may be contrary to the policy of the law without being morally disgraceful or exposed to any obvious moral censure.

(*d*) *Fisher v. Bridges* (1854) 3 E. & B. 707. This doctrine has been extra-
342; 97 R. R. 701, Ex. Ch.; *Geere v.* judicially criticised, but seems quite
Mare (1863) 2 H. & C. 339; 133 R. R. sound.

8. 23. English authorities on the subject of agreements being held unenforceable as running counter to positive legal prohibitions, to morality, or to public policy, are extremely voluminous and various. Many of them are inapplicable to the circumstances of British India ; not that the elementary rules of law or morality differ in substance in England and in India, but because under the conditions of Indian manners and society such facts as are dealt with by certain classes of English decisions do not occur. References to some of the English cases on matters of general interest will be found in the judgments of Indian Courts digested below. Some topics, on the other hand, are still of practical importance in India, though they are obsolete or all but obsolete in England. We proceed to discuss the several heads of the section with reference to the Indian authorities.

“Forbidden by law.”—An act or undertaking is equally forbidden by law whether it violates a prohibitory enactment of the legislature or a principle of unwritten law. But in British India, where the criminal law is codified, acts forbidden by law would seem practically to consist of acts punishable under the Penal Code and of acts prohibited by special legislation, or by regulations or orders made under authority derived from the Legislature. Parties are not, as a rule, so foolish as to commit themselves to agreements to do anything obviously illegal, or at any rate to bring them into Court ; so the kind of question which arises in practice under this head is whether an act, or some part of a series of acts, agreed upon between parties, does or does not contravene some legislative enactment or regulation made by lawful authority. The decision of such a question may turn on the construction of the agreement itself, or of the terms of the Act or other authoritative document in question, or on both. In particular it may have to be considered whether the intention of the legislator was to prevent certain things from being done, or only to lay down terms and conditions on which they might be done. It is easy to say that properly drawn Acts or Regulations ought to leave no doubt on that point, but experience has shown that such doubts are possible and have not been uncommon. Broadly speaking, that which has been forbidden in the public interest cannot be made lawful by paying the penalty for it ; but an act which is in itself harmless does not become unlawful merely because

some collateral requirement imposed for reasons of mere administrative convenience has been omitted. There was a time when the English Courts almost regarded it as meritorious to evade statutory regulations, and encouraged evasions of them by fine distinctions; but such has long ceased to be the judicial policy at home, and in India it would be extremely unwise to rely on old decisions of that kind, even when they have not been overruled or judicially censured.

It is possible for a statute to attach a penalty to making a particular kind of agreement, and at the same time to provide that such an agreement, if made, shall not be, therefore, void. We do not know of more than one such case in England (*e*), or of any in British India.

Cases under this head have arisen principally in connection with Excise Acts, and they have almost all been decided with reference to principles of English law. Those principles may be stated thus: "When conditions are prescribed by statute for the conduct of any particular business or profession, and such conditions are not observed, agreements made in the course of such business or profession are void if it appears by the context that the object of the Legislature in imposing the condition was the maintenance of public order or safety or the protection of the persons dealing with those on whom the condition is imposed; but they are valid if no specific penalty is attached to the specific transaction, and if it appears that the condition was imposed for merely administrative purposes, *e.g.*, the convenient collection of the revenue (*f*)."

The above principles were followed by the High Court of Bombay in a case (*g*) where the question arose as to whether an agreement by a lessee of tolls from Government under the Bombay Tolls Act, 1875, to sublet the tolls was valid and binding between the lessee and sub-lessee. S. 10 of the Act empowered the Government to lease the levy of tolls on such terms and conditions as the Government deemed desirable. One of the conditions of the lease was that the lessee should not sublet the tolls without the permission of the Collector previously obtained, and another condition empowered the Collector to impose a fine of Rs. 200 for a breach of the condition. The lessee sublet the

(*e*) See Pollock on Contract, 312.

(*f*) *Ib.*, p. 310.

(*g*) *Bhikanbhai v. Hirabai* (1900) 24

Bom. 622.

8. 23. tolls to the defendant without the permission of the Collector, and then sued him to recover the amount which he had promised to pay for the sublease. It was contended on behalf of the defendant that the sublease was unlawful as it was made without the permission of the Collector and that the lessee was not therefore entitled to recover the amount claimed by him. But this contention was overruled, and it was held that the plaintiff was entitled to succeed. Parsons, J., after citing the passage set forth above, said: "In our opinion this case falls within the latter class, *because the statute itself does not forbid or attach a penalty to the transaction of subletting*, but merely gives power to impose a condition under which it can be forbidden should the Collector see fit to do so for what can be only purely administration purposes. The Act imposing tolls is an Act passed for the benefit of the revenue and not an Act for the protection of public morals." Ranade, J., said: "As a general rule, the law does not forbid things in express terms, but imposes penalties for doing them, and the imposition of such penalties implies prohibition, and an agreement to do a thing so prohibited is unlawful under section 23 of the Contract Act. As no penalties are prescribed under the [Tolls] Act, the agreement does not *prima facie* fall under the 1st clause of section 23." Similarly where the lessee of a ferry under the Madras Ferries Act, 1890, transferred the ferry to the defendant without the permission of the Collector as required by the terms of the lease, it was held that the transfer was not for that reason unlawful, as neither the Act nor any rule framed under the Act prohibited such transfer. In such a case though the transfer may be invalid against Government, it is valid as between the transferor and transferee (*h*). Similarly where a license to cut grass was given by the Forest Department under the Forest Act, 1878, and one of the terms of the license was that the licensee should not assign his interest in the license without the permission of the Forest Officer, and a fine was prescribed for a breach of this condition, it was held that there being nothing in the Forest Act to make it obligatory upon the parties to observe the conditions of the license, the assignment would be binding upon the parties, though it was competent to the Forest Officer to revoke the license if he thought

(*h*) *Abdulla v. Mammad* (1902) 26 *Khan* (1879) 2 All 411 [F. B.]
Mad. 150; *Gauri Shanker v. Muntaz Ali*

fit to do so (i). The above Acts, which are intended solely for the protection of revenue, must be distinguished from Abkari and Opium Acts, which have for their object the protection of the public as well as the revenue. Thus an agreement to sublet a license to sell arrack issued under the Madras Abkari Act, 1886 (j), or a license to manufacture and sell country liquor granted under the N.-W.P. Excise Act, 1887 (k), or a license to sell opium issued under the Opium Act, 1878 (l), or a license to manufacture salt under the Bombay Salt Act, 1890 (m), without the permission of the Collector, is illegal and void, the sublease in each case without such permission being prohibited by statute, and no suit will lie to recover any money due or any sum deposited under such an agreement. The result is the same where the holder of such a license does not actually sublet or transfer the license, but does an act which amounts to a sublease or a transfer, as where he sells his business in an excisable article in consideration of a money payment with leave to the purchaser to carry on the business in his name, and obtains an indemnity from the purchaser against all loss, claims and demands in respect of the business. In such a case he cannot recover from the purchaser either the consideration money or payments made by him for debts contracted by the purchaser in the business and covered by the indemnity (n). Similarly, a partnership agreement entered into in violation of the terms of a license granted under the Bombay Abkari Act, 1877, which prohibited the licensee from admitting any partner in the business, the violation being punishable under the Act, is void as forbidden by law (o); and if a person, being aware of this prohibition, does join as a partner, and advances capital for that purpose,

(i) *Nazuralli v. Baba Miya* (1916) 40 Bom. 64.

(j) *Thithi Pakrudasu v. Bheemudu* (1902) 26 Mad. 430.

(k) *Debi Prasad v. Rup Ram* (1888) 10 All. 577.

(l) *Raghunath v. Nathu Hirji* (1894) 19 Bom. 626.

(m) *Ismailji v. Raghunath* (1909) 33 Bom. 636.

(n) *Behari Lal v. Jagodish Chunder*

(1901) 31 Cal. 798.

(o) *Hormasji v. Pestanji* (1887) 12 Bom. 422. In a recent Punjab case it was held that a partnership agreement by a licensee under the Excise Act XII of 1896, which applies in Northern India, Burma, and Coorg, was not void under this section, as it did not contravene any of the rules framed under that Act: *Bisheshar Das v. Govind Ram* (1906) Punj. Rec. no. 114.

- S. 23. he cannot recover back the amount advanced (*p*). And where a rule framed under the Madras Abkari Act, 1886, prohibited on pain of a fine, the holder of a license for the sale of toddy from being interested in the sale of arrack and the holder of a license for the sale of arrack from being interested in the sale of toddy, it was held that an agreement of partnership in the business of selling arrack and toddy entered into between a holder of a license for the sale of toddy and the holder of a license for the sale of arrack was void, and that neither party could sue the other for the recovery of money due to him in respect of the partnership (*q*).

But a condition prohibiting the licensee from "selling, transferring or subletting" has been held not to prohibit the licensee from admitting partners in the business to which the license relates (*r*). The same has been held of a condition prohibiting the licensee from "subletting, selling, mortgaging or otherwise alienating whole or in part the privilege granted by this license of manufacturing salt (*s*)."

The sale of fermented liquor without a license, such a sale being punishable under the Bengal Excise Act, 1878, is unlawful, and the vendor is not entitled to recover the price thereof from the buyer (*t*).

In a recent Madras case an agreement by a Madras District Municipality by which it farmed out its right to collect fees on the slaughter of animals was held void as being *ultra vires*, so that the Municipality could not sue on it. The Court said "The powers of a Corporation must be strictly construed and it is hardly too much to say that what is not permitted to such a body is forbidden" (*u*). But this, according to current English authorities, is not accurately expressed. There is no such rule of construction as supposed, and acts *ultra vires* are not *forbidden*; the attempt to

(*p*) *Gopalrao v. Kallappa* (1901) 3 Bom. L. R. 164.

(*q*) *Marudamuthu v. Rangasami* (1900) 24 Mad. 401.

(*r*) *Gaveri Shanker v. Mumtaz Ali* (1879) 2 All. 411, 413; *Karsan v. Gatlu* (1913) 37 Bom. 329.

(*s*) *Champsey Dossa v. Gordhandas Kessowji* (1917) 19 Bom. L. R. 381. In

Nalain Padmanabham v. Sait Badrinadh (1912) 35 Mad. 582, it was assumed that the words "You shall not sell, transfer or subrent your privilege" included the admission of partners.

(*t*) *Boistub Churn v. Wooma Churn* (1889) 16 Cal. 436.

(*u*) *Municipal Council, Kumbakonam v. Abbah Sahib* (1913) 36 Mad. 113.

do such an act is a nullity (r). Cases on the doctrine of *ultra vires* S. 23.
are not really relevant to s. 23.

Agreements to assign or sublet licences granted under the excise laws must be distinguished from agreements to sublet a contract with a public department. Thus in a Bombay case (w) the defendant contracted with the Executive Engineer of the Public Works Department to supply materials for the construction of a public road. One of the conditions of the contract was that no work was to be underlet by the contractor without the express permission in writing of the Executive Engineer or his duly authorised agent. Subsequently the defendant, without obtaining the requisite permission, entered into an agreement with the plaintiff under which the plaintiff was to do the contract work, and the defendant to pay him all the moneys that might be received by him from the Executive Engineer under the contract after deducting 10 per cent. as the defendant's profit. It did not appear that the plaintiff knew of the condition against underletting contained in the contract. The plaintiff sued the defendant for the balance of money due to him under the agreement. It was held that, as the plaintiff did not appear to have any knowledge of the restrictive condition in the contract, he was entitled to enforce his own contract against the defendant. The Court did not consider it necessary to decide whether the sub-contract was void as opposed to public policy, at the same time intimating its opinion that the sub-contract was to be distinguished from the subletting of a license granted under the excise laws and intended by the Legislature for the use of the licensee only. It was further held that, even if the plaintiff could not enforce his contract, he was at all events entitled under the circumstances to receive from the defendant compensation for the work and labour of which the defendant had received the benefit.

"Defeat the provisions of any law."—The term "law" in this expression would seem to include any enactment or rule of law for the time being in force in British India. This branch of the subject may thus be considered under three heads according as the object or

(r) See Pollock on Contract, 133,
8th ed.

(w) *Gangadhar v. Damodar* (1896) 21
Bom. 522.

- S. 23.** consideration of an agreement is such as would defeat (1) the provisions of any legislative enactment, or (2) the rules of Hindu or Mahomedan law, or (3) other rules of law for the time being in force in British India.

1. **Legislative enactments.**—Where a lessee of a village from a zamindar agreed to collect from the ryots and pay over to the zamindar an annual festival cess up to that time recovered by the zamindar, it was held that the zamindar could not recover from the lessee the amount of the cess collected by him, the cess being of a nature prohibited by the Bengal Rent Recovery Act X of 1859, s. 10 (x). Where a tenant agreed by a registered *Kabuliat* to deliver to his landlord in addition to rent certain agricultural produce, and further to supply the landlord with a cart and bullocks when necessary, and in default to pay the cash value of the said dues along with the rent, it was held that the agreement was one to pay cess, and was therefore void as being barred by the provisions of the U. P. Land Revenue Act III of 1901, s. 56 (y). And where the manager of a temple at Broach sued the defendant to establish the right of the temple to levy a cess on cotton purchased in Broach and exported from it, it was held that, assuming that the defendant impliedly assented to pay the cess, the agreement was unlawful as being against the provisions of the Bombay Town Duties Act XIX of 1844, which abolished cesses of every kind not forming part of the land revenue (z). Similarly where A. was required under the Code of Criminal Procedure (a) to furnish a surety for his good behaviour, and B. agreed to become a surety on condition that A. would deposit with him the sum in which he was required to go bail, and the deposit was made, it was held, in a suit brought after the expiry of the period of suretyship, that A. was not entitled to recover the deposit from B., as the effect of the agreement was to defeat the provisions of the Code by rendering B., a surety only in name (b). Likewise, a surety who has given a bail for an accused person cannot recover from the accused the bail which has been forfeited in consequence of

(x) *Kamala Kant Ghose v. Kalu raj v. Robb* (1884) 8 Bom. 398.

Mahomed (1800) 3 B. L. R. A. C. 44.

(a) Then Act X of 1872, s. 505, now

(y) *Sis Ram v. Asghar Ali* (1913) 35

Act V of 1898, s. 107.

ALL. 19.

(b) *Patch Singh v. Sanwal Singh*

(z) *Goelvami Shri Purushotamji Maha-*

(1878) 1 ALL. 751.

the accused failing to appear when required by the Court which released him on bail (c). And it is conceived that a suit will not lie to recover the amount of a loan by a British subject to a native prince in India without the consent of the Government, such loans being prohibited by the East India Company's Act, 1797 (37 Geo. III. c. 142, s. 28). But where an agreement is merely "void" as distinguished from "illegal," *e.g.*, an agreement to give time to a judgment debtor without the sanction of the Court (d), either party may, on performing his part of the contract, enforce the contract as against the other (e). S. 23.

The provisions of the Insolvent Debtors Act afford further illustrations of the class of agreements now under consideration. Thus an agreement by which an insolvent who has obtained his personal, but not his final, discharge settles the claim of one creditor without notice to the official assignee or his other creditors, and by which that creditor agrees not to oppose his final discharge, is void as in fraud of the creditors and as inconsistent with the policy of that Act (f). Similarly a promissory note whereby a creditor secures for himself a larger payment from an insolvent than what he is entitled to under a composition deed is void where the other creditors are not aware of the arrangement. The same principle applies even though the note may have been passed to the creditor by a third party if it is done with the insolvent's knowledge (g). And it has been recently held by the High Court of Bombay that a composition deed whereby a debtor assigned the whole of his property to trustees for the benefit of such of his creditors as should sign the deed within a certain period is void as against the official assignee (h). On like grounds a collusive assignment of a contract by a party thereto on the eve of his insolvency to his brother-in-law with the object of defrauding his creditors is void under this section and s. (6), cl. (h), of the Transfer of Property Act,

(c) *Sunder Singh v. Kishen Chand* (1899) *Punj. Rec.* no. 1. *Trimuk Municipality* (1903) 28 *Bom.* 66, 73.

(d) Such an agreement was declared to be void under the Code of Civil Procedure, 1882, s. 257A. That section has now been omitted in the Code of Civil Procedure, 1908. (f) *Naoroji v. Kazi Sidick Mirza* (1896) 20 *Bom.* 636.

(g) *Krishnappa Chetti v. Adimula Mudali* (1896) 20 *Mad.* 84; *Mahamad v. Parameswara* (1906) 16 *Mad. L. J.* 418.

(e) *Bank of Bengal v. Vyabhoy* (1801) 16 *Bom.* 618. See also *Abaji v.* (h) *Manmohandas v. N. C. Macleod* (1902) 26 *Bom.* 765.

8. 23. 1882 (i), as the effect of such an assignment is to defeat the provisions of the Insolvency Act by preventing the benefit of the contract from vesting in the official assignee (j).

A mortgage of immovable property belonging to a minor by a person holding a certificate of administration in respect of the estate of the minor under the Bengal Act XL of 1858(k) is void where it is made without the sanction of the Court, even though the mortgage money was advanced to liquidate ancestral debts and to save an ancestral property from sale in the execution of a decree (l). Where a specific kind of land or specific rights in land have been declared by the Legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section (m). Thus a sale by occupancy tenants of occupancy rights is void, it being of such a nature that if permitted it would defeat the provisions of the N.-W.P. Rent Act (n). Similarly an agreement to transfer the rights of an ex-proprietary tenant in a *mahal* is illegal, as it would defeat the provisions of the N.-W. P. Rent Act XII of 1881, s. 7 (o). But there is nothing in the provisions of the latter Act to render an assignment by a *lambaradar* of the profits of a *mahal* unlawful under this section (p). A usufructuary mortgage of an occupancy holding by an occupancy tenant is void under this section, for, if permitted, it would defeat the provisions of the Agra Tenancy Act II of 1901, s. 21 (q). Similarly an agreement by an ex-proprietary tenant to pay rent for his ex-proprietary holding at a rate higher than that prescribed

(i) Clause (h) of s. 6 of the Transfer of Property Act provides that no transfer can be made for an unlawful object or consideration within the meaning of s. 23 of the Contract Act.

(j) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1907) 34 Cal. 289, in appeal from (1906) 33 Cal. 702.

(k) Repealed by the Guardian and Wards Act VIII of 1890, of which see ss. 29 and 30.

(l) *Chimman Singh v. Subran Kau.* (1880) 2 All. 902.

(m) *Phalli v. Matabadal* (1883) All. W. N. 7 (a case under N.-W. P. Rent

Act XII of 1881, s. 9, relating to occupancy rights); *Indar v. Khushli* (1886) All. W. N. 88 (a case under N.-W. P. Revenue Act XIX of 1873, s. 125, relating to *sir* land).

(n) *Jhinguri v. Durga* (1885) 7 All. 878.

(o) *Koshi Prasad v. Kedar Nath Sahu* (1897) 20 All. 219.

(p) *Chadma Lal v. Kishen Lal* (1894) All. W. N. 17; *Bhagwan Das v. Bhajju Mal* (1894) All. W. N. 140.

(q) *Ram Sarup v. Kishan Lal* (1907) All. W. N. 76.

by s. 10 of the said Act, is void, as it would make the provisions of that section entirely nugatory (*r*). But it has been recently held by the Judicial Committee that an agreement by the defendants for relinquishment of all their *Sir* and *Khudkasht* lands and ex-proprietary rights therein to the plaintiffs none of whom were at the date of the agreement proprietors, landholders or co-sharers in the land to be relinquished, and for payment of damages for any breach of the agreement by them, is illegal and void as being in contravention of the policy of the said Act (*s*). And where a specific individual has been declared, under an Act to be incompetent to transfer land belonging to him a transfer of his land by that person is void under this section, and such a transfer cannot be enforced even after removal of the disability (*t*). And it has been held by the High Court of Madras that an agreement by a debtor not to raise the plea of limitation is void under this section, as it would defeat the provisions of the Limitation Act (*u*), though not avoided by s. 28 (see notes thereon below). But a stipulation for payment of compound interest, though not allowed by the Regulations in force in the Santhal Perganas (*v*), is not unlawful within the meaning of the present section (*w*). Nor is an alienation made pending a temporary injunction under s. 492 of the Civil Procedure Code [now O. 39, r. 1] unlawful under this section (*x*). A loan by a military officer to a man under his command is not unlawful as being against the law, though such a loan may be against the rules of discipline (*y*). A compromise of a suit whereby the defendant agrees to a mortgage decree being passed against him even in respect of a claim not secured by a mortgage is not unlawful or opposed to public policy (*z*). There is nothing in the Bengal Drainage Acts (*a*) to render invalid a contract between a

(*r*) *Prag v. Sital* (1914) 36 All. 155.

(*s*) *Moti Chand v. Ikram-Ullah Khan* (1917) 39 All. 173.

(*t*) *Radha Bai v. Kanod Singh* (1908) 30 All. 38 (a case under Jhansi Incumbered Estates Act XVI of 1882, s. 8, relating to disqualified zamindars).

(*u*) *Balla-pragada v. Thummana* (1917) 40 Mad. 701.

(*v*) Regulation III. of 1872, s. 6, and Regulation V. of 1893, s. 24.

(*w*) *Shama Charan v. Chuni Lal* (1898) 26 Cal. 238.

(*x*) *Manohar Das v. Ram Antar* (1903) 25 All. 431.

(*y*) *Asa Singh v. Sadda Singh* (1873) Punj. Rec. no. 16.

(*z*) *Bhuvanagiri Subbarayudu v. Marudugula Venkataratnam* (1907) 17 Mad. L. J. 200.

(*a*) Act VI of 1880 and Act II of 1902.

8. 23. landlord and his tenant by which the latter agrees to pay the former drainage cost in respect of land on which rent has for the first time been imposed, in consequence of a scheme of works carried out under the Acts benefitting it (b).

2. Rules of Hindu and Mahomedan law.—An agreement that would defeat the provisions of Hindu law would be unlawful within the meaning of the present clause. A contract to give a son in adoption in consideration of an annual allowance to the natural parents is an instance of this class, and a suit will not lie to recover any allowance on such a contract, though the adoption may have been performed. The Hindu law does not recognise in this *kali yug* any adoption but that of a *dattak* son, and such a son is defined in the Dattaka Chandrika (s. 1, par. 12) as a son “*affectionately given by his father or mother.*” Besides defeating the provisions of the Hindu law, such an agreement would involve an injury to the person and property of the adopted son, “inasmuch as, if it could be proved that the boy was purchased and not given, it is very probable that the adoption would be set aside, and if such adoption were set aside he would not only lose his status in the family of his adopting father, but also lose his right of inheritance to his natural parents” (c).

And it has been held by the High Court of Bengal (d) that a contract entered into by Hindus living in Assam, by which it is agreed that, in the event of the husband leaving the village in which the wife and her friends resided, the marriage was to become null and void, is “contrary to the policy of the law” (e), and to the “policy and spirit of the Hindu law” (f). Again, it is a rule of Hindu law that for the fulfilment of the duties which the law imposes upon a wife she must reside with her husband wherever he may choose to reside. An agreement, therefore, by a Hindu husband that he will not be at liberty to remove his wife from her parents’ abode to his own abode is illegal, as, if permitted, it would defeat the rule of Hindu law on the subject. Such an agreement is, besides, opposed to public policy. An

(b) *Jyoti Kumar v. Hari Das* (1905) pp. 179, 180.

32 Cal. 1019.

(c) *Eshan Kishor v. Haris Chandra*

(1874) 13 B. L. R. App. 42; *Sitaram*

v. Harikur (1910) 35 Bom. 169, at

(d) *Sitaram v. Mussamut Ahcerree*

Heerahnee (1873) 11 B. L. R. 129.

(e) *Ib.*, per Couch, C. J., at p. 134

(f) *Ib.*, per Kemp, J., at p. 135.

agreement of this kind is no defence to a suit by the husband for the restitution of conjugal rights against his wife, and for a decree directing her to live with him at his house (g). S. 23.

An agreement entered into before marriage between a Mahomedan wife and husband by which it is provided that the wife should be at liberty to live with her parents after marriage is also void, and does not afford an answer to a suit for restitution of conjugal rights (h). Similarly, an agreement entered into after marriage between a Mahomedan wife and husband who were for some time prior to the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband she should be free to leave him, is void, and does not constitute a defence to the husband's suit for restitution of conjugal rights (i). Upon the same principle, an agreement between a Mahomedan husband and wife for a future separation is void, and the wife cannot on separation recover the maintenance allowance provided by the agreement (j). But an agreement made between a Mahomedan wife and husband entered into before marriage by which it is provided that the wife should be at liberty to divorce herself from her husband under certain specified conditions is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mahomedan Law. When such an agreement is made, the wife may, at any time after the happening of the contingencies, repudiate herself in the exercise of the power, and a divorce will then take effect as if the *talāq* had been pronounced by the husband. This is known in Mahomedan law as *talāq* (divorce by the husband) by *tafwiz* (delegation), the wife being, as it were, delegated by the husband to pronounce the *talāq* (k). But an ante-nuptial agreement between a Hindu husband and wife enabling the wife to avoid the marriage if the

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| <p>(g) <i>Tekait Mon Mohini Jemadai v. Basanta Kumar Singh</i> (1901) 28 Cal. 751; <i>Lahoran Sheikh Nabbi v. Madar Baksh</i> (1878) <i>Punj. Rec.</i> no. 20.</p> <p>(h) <i>Abdul v. Husseinbi</i> (1904) 6 Bom. L. R. 728.</p> <p>(i) <i>Meherally v. Sakerkhanobai</i> (1905) 7 Bom. L. R. 602.</p> <p>(j) <i>Fatma v. Ali Mahomed</i> (1912)</p> | <p>37 Bom. 280.</p> <p>(k) <i>Hamidoola v. Faizunnissa</i> (1882) 8 Cal. 327; <i>Ayatunnissa Beebee v. Karam Ali</i> (1908) 36 Cal. 23. <i>Maharam Ali v. Ayasa Khatum</i> (1915) 19 C. W. N. 1226 [the condition in this case was divorce if husband married a second wife].</p> |
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8. 23. husband married an additional wife, or did not treat her kindly, or asked her to live at place D. instead of place B., is void, such an arrangement being repugnant to the spirit of the Hindu law (l).

We may here note some caste customs which the Courts have held to be invalid on the ground that they are opposed to the spirit of Hindu Law. These are—(1) a custom preventing a married woman to leave her husband and contract a second marriage without the husband's consent (m); (2) a custom authorizing a woman to contract a second marriage without a divorce, on payment of a certain sum to the caste (n); (3) a custom by which the marriage tie can be dissolved by either party without the consent of the other, on payment of a sum of money to be fixed by the caste (o). The Calcutta High Court, however, has recognized the validity of a custom which allows a married woman, who has been relinquished by her husband, to contract a second marriage (p). A *karnavan* of a *tarwad* cannot part by contract, so as to be unable to resume them, with the privileges and duties which attach to his position as *karnavan* (q). Such an agreement is invalid on the principle that "there can be no renunciation of rights and consequent destruction of relative duties prescribed by an absolute law" (r).

3. Other rules of law in force in British India.—It is now a settled principle of law that where a decree is silent as to subsequent interest on the amount decreed, interest cannot be recovered by proceedings in execution of the decree (s). But an agreement in the nature of a compromise between a decree-holder and a judgment-debtor, which proceeds upon ignorance common to both parties thereto, as to the above principle, is not illegal as defeating the provisions of that law (t). Again, it is a well-established rule of law that, unless a will is proved

(l) *Chait Ram v. Mussammat Nathi* 19 Cal. 627; In re *Mussamut Chamia* (1900) Punj. Rec. no. 15. 7 C. L. R. 354.

(m) *Reg v. Karsan Goja* (1864) 2 Bom. H. C. 117; *Narayan v. Laving Bharthi* (1877) 2 Bom. 140. (q) *Cherukomen v. Ismala* (1871) 6 M. H. C. 145.

(n) *Uji v. Hathi Lahu* (1870) 7 Bom. H. C. (A. C.) 133. (r) *Ib., per Holloway, J.* at p. 150.

(o) *Keshav v. Bai Gandi* (1915) 39 Bom. 538. (s) *Pillai v. Pillai* (1875) 15 B. L. R. 383; L. R. 2 Ind. Ap. 219.

(p) *Jukni v. Queen-Empress* (1892) 3 Cal. 602. (t) *Seth Gokul Dass v. Murli* (1878)

in some form, no grant of probate can be made merely on the consent of parties. Hence an agreement or compromise as regards the genuineness and due execution of a will, if its effect is to exclude evidence in proof of the will, is not lawful so as to be enforceable under the provisions of s. 375 of the Civil Procedure Code [now O. 23, r. 3] (*u*). Similarly, a receiver being an officer of the Court, the Court alone is to determine his remuneration, and the parties cannot by any act of theirs add to, or derogate from, the functions of the Court without its authority (*v*). A promise, therefore, to pay the salary of a receiver without leave from the Court, even if unconditional, being in contravention of the law, is not binding on the promisor (*w*). But an agreement providing for remuneration to be paid to an executor not out of the assets of the testator, but from the pocket of a third person, is neither forbidden by the Administrator-General's Act, 1874, s. 56 (*x*) nor is it one which if permitted would defeat the provisions of that Act, nor is it against public policy (*y*).

"**Fraudulent.**"—A sale of immoveable property pending a suit against the vendors to recover a debt is not invalid merely because the motive of the vendors may have been to prevent the land from being attached and sold in execution. In such a case the only question is whether the sale was a real transfer of the title to the land for a fair money consideration. The motive of the vendors to defeat the execution of any decree that may be passed against them is immaterial (*z*). In this connection may be noted the provisions of s. 53 of the Transfer of Property Act IV of 1882. That section provides *inter alia* that "every transfer of immoveable property made with intent to defeat or delay the creditors of the transferor is voidable at the option of any person so defeated or delayed," but that "nothing in this section contained shall impair the rights of any transferee in good faith and for consideration." Such a transfer is not illegal, for the section merely

(*u*) *Monmohini Guha v. Banga Chandru Das* (1903) 31 Cal. 357.

(*v*) See Civil Procedure Code, O. 40, r. 1.

(*w*) *Prokash Chandra v. Adlam* (1903) 30 Cal. 606.

(*x*) This section has been repealed: see Act of 1902, s. 4.

(*y*) *Narayan Coomari Debi v. Shajani*

Kanta Chatterjee (1894) 22 Cal. 14.

(*z*) *Pullen Chetty v. Ramalinga Chetty* (1870) 5 M. H. C. 368, referring to *Sankarappa v. Kamayya* (1866) 3 M. H. C. 231, and *Gnanabhai v. Srinivasa Pillai* (1868) 4 M. H. C. 84. See also *Rujan Harji v. Ardeshir Hormusji* (1879) 4 Bom. 70.

8. 23. declares that it shall be *voidable* at the option of the party affected by the transfer. Where the object of an agreement between A. and B. was to obtain a contract from the Commissariat Department for the benefit of both, which could not be obtained for both of them without practising fraud on the Department, it was held that the object of the agreement was fraudulent, and that the agreement was therefore void (a). But an agreement between A. and B. to purchase property at an auction sale jointly, and not to bid against each other, is perfectly lawful (b).

“*Injury to the person or property of another.*”—The consideration or object of an agreement is unlawful when it involves or implies injury to the person or property of another. A mortgage-bond, whereby a person who is entitled to a moiety only of certain property mortgages the whole of that property, is not void under this section as to the moiety belonging to him, merely because he purports to mortgage the other moiety also not belonging to him (c). A bond which compels the executant to daily attendance and manual labour until a certain sum is repaid in a certain month and penalizes default with overwhelming interest is unlawful and void, “such a condition”, the Court said, “is indistinguishable from slavery, and such a contract is, in our opinion, opposed to public policy and not enforceable” (d). For another instance of an agreement void under this head, see the adoption case cited in the notes to this section under the head “Rules of Hindu and Mahomedan Law,” p. 158, above.

“*Immoral.*”—A landlord cannot recover the rent of lodgings knowingly let to a prostitute who carries on her vocation there (e).

(a) *Sahib Ram v. Nagar Mal* (1884) Punj. Rec. no. 63.

(b) *Nanda Singh v. Sunder Singh* (1901) Punj. Rec. no. 37. *Quis negavit?*

(c) *Jogu Mohen Deb v. Dandoong Burman* (1908) 12 C. W. N. 94.

(d) *Ram Sarup v. Bansi Mandar* (1916) 42 Cal. 742; *Sotish Chandra v. Kashi Saku* (1918) 3 Pat. L. J. 412. But see *Anandiram v. Goca* (1918) 27 Cal. L. J. 459, where the court was inclined to a different opinion. *Wallis v. Doy* (1837) 2 M. & W. 273, 46 R. R. 602, decided only that a covenant to serve in a

certain trade for life, and not exercise it otherwise, is not in itself in excessive restraint of trade. Cp. Pollock on Contract, p. 383, 8th ed.

(e) *Gaurinath Mookerjee v. Madhumani Peshakar* (1872) 9 B. L. R. App. 37; *Pirithi Mal v. Mussammatt Bhagan* (1898) Punj. Rec. no. 2; *Brinkman v. Abdul Ghafur* (1904) Punj. Rec. no. 65; *Bani Mancharam v. Regina Slanger* (1907) 32 Bom. 581, at pp. 586 *et seq.*; *Choga Lal v. Piyari* (1908) 31 All. 58

Otherwise, if the landlord did not know that the lodging were required for prostitution (*f*). Similarly, money lent to a prostitute expressly to enable her to carry on her trade cannot be recovered (*g*). Likewise money advanced by the plaintiff to the defendant to enable the defendant to continue cohabitation with a dancing girl cannot be recovered (*h*). On like grounds, ornaments lent by a brothel-keeper to a prostitute for attracting men and encouraging prostitution cannot be recovered back (*i*). An assignment of a mortgage to a woman for future cohabitation is void, and it can be set aside at the instance of the assignor though partial effect may have been given to the illegal consideration (*j*). And it has been held that money paid by a wife to a third person to be given as a bribe to a gaoler for procuring the release of her husband from gaol could not be recovered back on failure of the gaoler to procure the release (*k*). Similarly, where the plaintiff advanced moneys to the defendant, a married woman, to enable her to obtain a divorce from her husband, and the defendant agreed to marry him as soon as she could obtain a divorce, it was held that the plaintiff was not entitled to recover back the amount, as the agreements had for its object the divorce of the defendant from her husband, and the promise of marriage given under such circumstances was *contra bonos mores* (*l*). An agreement to pay money upon the consideration that the plaintiff should give evidence in a civil suit on behalf of the defendant cannot be enforced. Such an agreement may be for giving true evidence, and then there is no consideration, for "the performance of a legal duty is no consideration for a promise"; or it may be for giving favourable evidence either true or false, and then the consideration is vicious (*m*).

(*f*) *Sultan v. Nanu* (1877) *Punj. Rec.* no. 22.

(*g*) *Bholi Baksh v. Gulia* (1876) *Punj. Rec.* no. 64.

(*h*) *Pannichand v. Nanoo Sunker* (1908) 18 *Mad. L. J.* 456.

(*i*) *Alla Baksh v. Chunia* (1877) *Punj. Rec.* no. 26. A similar English case is *Pearce v. Brooks* (1866) *L. R.* 1 *Ex.* 213 (goods sold to a prostitute known by the seller to be such, and to want the goods "for the purpose of enabling her to make a display favourable to her immoral purposes.")

(*j*) *Thusi Muthakannu v. Shennugarchu* (1905) 28 *Mad.* 413. See also *Alice Mary Hill v. William Clark* (1905) 27 *All.* 266, and *Mussammatt Roshun v. Muhammad* (1887) *Punj. Rec.* no. 46. All these cases are quite plain on the principles of English law.

(*k*) *Protima Aural v. Dukhia Sirkar* (1872) 9 *B. L. R.* App. 38.

(*l*) *Bui Vijli v. Nansa Nagar* (1885) 10 *Bom.* 152; *Mussammatt Roshun v. Muhammad* (1887) *Punj. Rec.* no. 46.

(*m*) *Sashannah Chetti v. Ramasamy Chetti* (1868) 4 *M. H. C.* 7.

8. 23. There is nothing in this decision, or in the reasons for it, to invalidate an expert's claim for services rendered in the way of professional investigation, though he may afterwards become a witness for his employer in a litigation arising out of the same facts.

Under the Common Law of England, and presumably under any monogamous law of marriage in a jurisdiction where promises of marriage are actionable, an agreement between a married man and a woman who knows him to be married to marry one another after the wife's death is void as being contrary to morality and public policy (n).

We shall next turn to cases of agreements not held to be immoral. A loan made for the purpose of teaching singing to *naikins* (dancing girls) has nothing immoral in its object, for although it might be true that most of the *naikins* who sing lead a loose life, singing is a distinct mode of obtaining a livelihood, not necessarily connected with prostitution (o). And it has been held by the High Court of Allahabad that a suit will lie for arrears of allowance agreed to be paid to a woman for past cohabitation (p). The Court observed: "Such a consideration, if consideration it can properly be called, which seems to us more than doubtful, would not be immoral so as to render the contract *de facto* void, but we think the more correct view is to regard the promise to pay the allowance as an undertaking on the part of Bikramajit Singh to compensate the woman for past services voluntarily rendered to him for which no consideration as defined in the Contract Act would be necessary." It would seem that the High Court thought the case was covered by s. 25 (2) of the Act, though the section is not specially referred to. But it is submitted that a consideration which is immoral

(n) *Wilson v. Carnley* [1908] 1 K. B. 729, C. A., confirming *Spiers v. Hunt*, *ib.* 720. It seems to be still good law that a promise of marriage made by a person who is married and conceals the fact from the promisee is actionable at the suit of the innocent promisee on the ground of the promisor's implied warranty that he can lawfully make and perform the promise: *Millward v. Littlewood* (1850) 5 Ex. 775; 82 R. R. 871. This, however, may be of little importance in India.

(o) *Khubchand v. Beram* (1888) 13 Bom. 150.

(p) *Dhiraj Kuar v. Bikramajit Singh* (1881) 3 All. 787. See also *Man Kuar v. Jasodha Kuar* (1877) 1 All. 478. Both these cases were referred to in *Lakshminarayana v. Subbalri Ammal* (1903) 13 Mad. L. J. 7, where Bhashyam Aiyangar, J., said that though it was not necessary to decide whether the view taken in those cases was correct, he did not express any dissent from it.

at the time, and, therefore, would not support an immediate promise to pay for it, does not become innocent by being past. The English view of such cases is that the alleged consideration is bad simply as being a past consideration not within any of the exceptional rules (so far as such exceptions really exist) allowing past consideration, under certain conditions, to be good. In a recent case the same High Court held that, adultery in India being an offence against the criminal law, cohabitation *past* or future, if *adulterous*, is not merely an immoral but an illegal consideration (q). In an old Madras case (r), the tenants of certain villages engaged the services of the defendant to advocate their cause with regard to assessments made upon the villages, and agreed to pay to him a sum of money subscribed amongst themselves if he succeeded in obtaining a more favourable assessment. A portion of the subscription amount was paid to him in advance, and it was agreed that if he failed in his work he should repay the amount. In a suit to recover the amount paid to the defendant on the ground that he had failed to perform his part of the contract, it was held that the plaintiffs were entitled to succeed, and that the agreement was not vitiated by illegality. The Court observed: "The point, then, for consideration is, Did the defendant for that purpose undertake, in consideration of the stipulated sum, to induce by corrupt or illegal means, or by the exercise of personal influence, any public servant to do an official act or show any favour? If he did not, the contract cannot be treated as illegal; and we are of opinion that the written agreement does not properly admit of such a construction." Here the principle was applied (p. 146, above) that, where it is possible to perform an agreement by lawful means according to its terms, an unlawful intention will not be presumed, and any party alleging such an intention must prove it.

"Opposed to public policy."—The general head of public policy covers, in English law, a wide range of topics. Agreements may offend against public policy by tending to the prejudice of the State in time of war (trading with enemies, etc.), by tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance) or, in private life, by attempting to impose inconvenient and

(q) *Alice Mary Hill v. William Clark*
(1905) 27 All. 286.

(r) *Pichakutty Mudali v. Narayana* (1864) 2 M. H. C. 243.

S. 23. unreasonable restrictions on the free choice of individuals in marriage, or their liberty to exercise any lawful trade or calling. Some of these matters are separately dealt with in the Contract Act (see ss. 26 and 27, below). It is now understood that the doctrine of public policy will not be extended beyond the classes of cases already covered by it. No Court can invent a new head of public policy (s); it has even been said in the House of Lords that "public policy is always an unsafe and treacherous ground for legal decision" (t). This does not affect the application of the doctrine of public policy to new cases within its recognised bounds (u).

1. **Trading with enemy.**—Agreements alleged to amount to trading with an enemy or otherwise to operate in the enemy's favour, in time of war, do not appear to have come before the Courts of British India, before the war of 1914. It is long-settled law that all trade with public enemies without licence of the Crown is unlawful. "The King's subjects cannot trade with an alien enemy, *i.e.*, a person owing allegiance to a Government at war with the King, without the King's licence" (v). This includes shipping a cargo from an enemy's port even in a neutral vessel (w). As a consequence of this, "no action can be maintained against an insurer of an enemy's goods or ships against capture by the British Government" (x). If the performance of a contract made in time of peace is rendered unlawful by the outbreak of war, the obligation of the contract is suspended or dissolved according as the intention of the parties can or cannot be substantially carried out by postponing the performance till the end of hostilities (y). In such a case a contracting party is not bound to perform a part of his undertaking which remains possible and lawful in itself, but would be useless without the rest (z). The recent development of cases of this class is dealt with under s. 56 below. The rules under this head

(s) Lord Halsbury, *Janson v. Drieffontein Consolidated Mines* [1902] A. C. 484, 491.

(t) Lord Davey [1902] A. C. at p. 500; Lord Lindley at p. 507, in very similar words, cited in *Gorind v. Pacheco* (1902) 4 Bom. L. R. 948.

(u) See *Wilson v. Carnley*, p. 164, above.

(v) Lord Macnaghten, *Janson v. Drieffontein Consolidated Mines* [1902] A. C.

at p. 499.

(w) *Potts v. Bell* (1800) 8 T. R. 548; 5 R. R. 452; *Esposito v. Bowden* (1857) 7 E. & B. 763; 110 R. R. 822.

(x) Lord Macnaghten, *Janson v. Drieffontein Consolidated Mines* [1902] A. C. at p. 499.

(y) *Esposito v. Bowden* (1857) 7 E. & B. 763; 110 R. R. 822.

(z) *Geipel v. Smith* (1872) L. R. 7 Q. B. 404.

become applicable only when an actual state of war exists. They cannot be made to relate back to a time before the war, though war may have been apprehended. A contract of insurance made before war cannot be vitiated, as regards a loss by seizure also before any act of public hostility, by the fact that war did break out shortly afterwards (*a*).

During the recent general war these principles have been confirmed and in some directions developed. One question found to need further definition was who is an enemy for the purpose of the rule, and especially how the friendly or hostile character of an incorporated company is to be tested. The seat of a man's business is of more importance than his domicile in the technical sense or even nationality (for an enemy subject allowed to remain here under the King-Emperor's protection is not a commercial enemy, and enemy subjects residing in friendly countries need not be); and in the case of a corporation the jurisdiction in which it is registered does not conclusively determine its character, nor yet the nationality of its individual shareholders, and it must be considered by whom and in what interest its affairs are in fact controlled (*b*).

An executory contract between parties of whom one becomes an alien enemy is thereby suspended or dissolved according to the nature of the case. It is dissolved if it contemplated a continuous performance which in the state of war would entail intercourse with the enemy, or if the continuance of duties to be performed after the war would assist the enemy's trade, or if the maintenance of the contract is otherwise against public policy, or if suspension of the current execution would substantially be imposing a new contract on the parties. An express suspensive condition in general terms is in no way conclusive. It may not be applicable to the event of war, or it may be contrary to public policy (*c*).

(*a*) *Janson v. Driefontein Consolidated Mines* [1902] A. C. 484.

(*b*) *Porter v. Freudenberg* [1915] 1 K. B. 857; *Daimler Co.'s case* [1916] 2 A. C. 307. It is not practicable to go into details here. See on the subject generally H. Campbell, *The Law of War and Contract*, London, Bombay, &c., Oxf. Univ. Press 1918. For an example of a nominally neutral company under enemy control see the *Clapham Steam-*

ship Co.'s case [1917] 2 K. B. 639.

(*c*) *Eitel Bieber & Co. v. Rio Tinto Co.* [1918] A. C. 260; *Naylor, Benzon & Co. v. Krainsche Industrie Gesellschaft* [1918] 1 K. B. 331, affirmed very shortly [1918] 2 K. B. 486, *Zinc Corporation v. Hirsch* [1916] 1 K. B. 541, C. A. We deal elsewhere with the effects of war conditions on contracts to which there is not an enemy party, see Notes on s. 56.

5. 23. 2. Stifling prosecution.—Agreements for stifling prosecutions are a well-known class of those which the Courts refuse to enforce on this ground. The principle is “that you shall not make a trade of a felony” (*d*). In England the compromise of any public offence is illegal. If the accused person is “innocent, the law [is] abused for the purpose of extortion; if guilty, the law [is] eluded by a corrupt compromise screening the criminal for a bribe” (*e*). It is not necessary to prove that there was any express threat of prosecution if the transaction in fact amounted to a bargain not to prosecute, and if the Court thinks the defence of illegality a disreputable one to raise in the circumstances, the only way in which it can give effect to its opinion is in dealing with the costs (*f*). But the English common law rule, that contracts for the compounding or suppression of criminal charges for offences of a public nature are illegal and void, has no application to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, if such a contract is permitted by the law of that country, and this whether the contract is entered into there or in British territory. A suit will, therefore, lie in British India on a bond passed to the plaintiff in consideration of his withdrawing a prosecution for theft instituted in the French Court at Pondicherry, the agreement being permissible by the French law (*g*). It would be difficult, indeed, to hold that the compromise of a French law suit in a manner allowed by French law could be injurious to the administration of justice in British India.

(*d*) Lord Westbury, *Williams v. Bayley* (1866) L. R. 1 H. L. 200, 220.

(*e*) *Keir v. Leeman* (1844) 6 Q. B. 308; 66 R. R. 392; 9 Q. B. 371, 392; 72 R. R. 298; *Windhill Local Board v. Vint* (1890) 45 Ch. Div. 357.

(*f*) *Jones v. Merionethshire Building Society* [1892] 1 Ch. 178, C. A.

(*g*) *Subraya Pillai v. Subraya Mudali* (1867) 4 M. H. C. 14. Reference was made in the course of the judgment to the rule of private international law that “the law of the place of a contract” governs its validity. That expression, however, is ambiguous. The local law governing the substance of a

contract may, according to the circumstances, be that of the place where it was made, or of that where it is to be performed; and these are only auxiliary tests for ascertaining the intention of the parties as to what law is to prevail: *Hamlyn & Co. v. Talisker Distillery* [1894] A. C. 202; Dicey, *Conflict of Laws*, 529, 565, 2nd ed. *Kaufman v. Gerson* [1904] 1 K. B. 591, C. A., looks at first sight *contra*; but the Court seems to have been influenced by peculiar facts, and it is far from clear that the decision was intended to lay down any general rule of law. And see p. 12, above.

A compromise of proceedings which are criminal only in form, and involve only private rights, may be lawful (*h*). This perhaps is of no importance in Indian practice, where we have a statutory list of compoundable offences (*i*). "The criminal law of this country makes a difference between various classes of offences. With regard to some, it allows the parties to come to an agreement and either not to take proceedings or to drop the proceedings after institution in a few instances even without the leave of the Court, and, in other instances, with the leave of the Court. But there are other instances which cannot be compounded or arranged between the parties. If the offence [is] compoundable and [can] be settled in or out of Court without the leave of the Court, there seems no reason why [a compromise] should be regarded as forbidden by law or as against public policy, the policy of the criminal procedure being to allow such a compromise in such cases" (*j*). Thus where A. agreed to execute a kabala of certain lands in favour of B. in consideration of B. abstaining from taking criminal proceedings against A. with respect to an offence of simple assault which is compoundable, it was held that the contract was not against public policy and that the same could be enforced (*k*). So a promise to pay a sum of money as compensation for the abduction of a woman is enforceable, provided the abduction does not constitute a non-compoundable offence (*l*). Likewise, money paid to compromise a charge of adultery may be recovered back, if the party to whom the money is paid proceeds with the prosecution of the charge, adultery being a compoundable offence (*m*). But where the offence is non-compoundable as where the charge is one of criminal breach of trust and the offence is compounded by the accused passing a bond to the complainant, the latter cannot recover the amount of the bond (*n*). And, further, if the accused was induced to pay money to the

(*h*) *Fisher & Co. v. Apollinaris Co.* (1875) L. R. 10 Ch. 297, as qualified by *Windhill Local Board v. Vint* (1890) 45 Ch. Div. 351.

(*i*) See s. 345, Criminal Procedure Code, 1898; see also Penal Code, ss. 213, 214.

(*j*) Per Cur. *Amir Khan v. Amir Jan* (1898) 3 C. W. N. 5.

(*k*) *Ibid.*

(*l*) *Shah Rahman v. Ismail Khan* (1904) Punj. Rec. no. 82.

(*m*) *Hosein Shah v. Nur Ahmed* (1875) Punj. Rec. no. 81.

(*n*) *Majibar v. Syed Mukhtashid* (1912) 40 Cal. 113; *Mottai v. Thanappa* (1914) 17 Mad. 385; *Ghulam Mohiy-ud-Din v. Deoki Nand* (1914) Punj. Rec., no. 39, p. 133.

8. 23. complainant in order that a criminal prosecution for an offence which was not compoundable should not be proceeded with, the accused is entitled to recover back the money as money paid under "coercion" within the meaning of s. 72 below. In such a case the parties cannot be said to be *in pari delicto* (o). But if there is no evidence of pressure or coercion, the money cannot be recovered back, because in such a case the parties will be deemed to be *in pari delicto* (p). In a Madras case, where the plaintiffs agreed to relinquish their right to a religious office in favour of the defendant in consideration of the latter withdrawing a charge of criminal trespass preferred against them, it was stated by Innes, J., that the agreement was illegal, as it "would amount to the stifling of a criminal prosecution for an offence which the law does not permit to be compounded." The case was, however, treated as one of "coercion," the charge of trespass being false, and the sole cause for entering into the agreement being "the well-founded terror of the influence of the prosecutor and of the civil death which would probably result from his proceedings" (q). In *Kessouji v. Harjivan* (r) it was held that a guarantee for the payment to creditors of debts due to them in consideration of the creditors abstaining from taking criminal proceedings against the debtor is void, as being against public policy. But it must be noted, as observed in that case, that "a man to whom a civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence, provided he does not, in consideration of such security, agree not to prosecute, and such an agreement will not be inferred from the creditor's using strong language. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties." Following this principle, it has been held that where a *bona fide* debt exists and where the transactions between the parties involve a civil liability as well as possibly a criminal act, a promissory note given by

(o) *Muthureerappa v. Ramaswami* (1917) 40 Mad. 285.

(p) *Anjadennesa Bibi v. Rahim Buksh* (1915) 42 Cal. 286, *Bindeshari Prasad v. Lekhraj Sahu* (1916) 1 Pat.

L. J. 48, 60, 61.

(q) *Pudishary Krishnen v. Karamally Kunhanni* (1874) 7 M. H. C. 378.

(r) (1887) 11 Bom. 566. See also *Gobardhan Das v. Jai Kishen Das* (1900) 22 All. 224, 230.

the debtor and a third party as security for the debt is not void under this section (s). As a suit will not lie on an agreement to stifle a prosecution so an agreement of this class will not avail as a defence to a suit. Thus, where in a suit for damages for wrongful arrest and confinement the defendant pleaded an agreement under which the plaintiff was to give up all claims against the defendant for his arrest and confinement in consideration of the defendant withdrawing charges of criminal trespass and being a member of an unlawful assembly preferred against the plaintiff, it was held that, the latter offence being non-compoundable, the agreement could not be set up as an answer to the suit (t). But the mere fact that A. makes an agreement with B., who intends, by means of something to be obtained or done under it, to effect an unlawful or immoral purpose, will not render the agreement illegal unless A. knows of that purpose. Thus, if B. sells his house to A. for the purpose of raising money to be given to certain third persons as a bribe to induce them to withdraw a charge of criminal breach of trust which they had preferred against B., the sale is not illegal unless it be proved that A. was aware of the unlawful object (u).

S. 23.

3. "ChamPERTY and Maintenance."—The practices forbidden under these names by English law (partly by old statutes which it is needless to specify here, and which are said to be only in affirmance of the common law) may be summarily described as the promotion of litigation in which one has no interest of one's own. Maintenance is the more general term; champerty, which in fact is the subject of almost all the modern cases, is in its essence "a bargain whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action" (v). Agreements of this kind are equally

(s) *Jai Kumar v. Gauri Nath* (1906) 28 All. 718; *Nanak Chand v. Durant* (1906) Panj. Rec. no. 9; *Sukhlal Das v. Mangalchand* (1917) 2 Pat. L. J., 630.

(t) *Dalsukhran v. Charles de Britton* (1904) 28 Bom. 326.

(u) *Rajkristo Moitra v. Koylash Chunder* (1881) 8 Cal. 24, citing Pollock, on Contract, p. 342, 2nd ed. (416, 417, 8th ed.). It need hardly be mentioned that, when A. promises to remunerate

B. in consideration of B. undertaking to use his influence over C. so as to effect a compromise of a civil dispute between A. and C., the consideration or object of the agreement is not unlawful: *Syed Mahomed v. Shah Vazirul Huq* (1911) 16 Cal. W. N. 480.

(v) *Hutley v. Hutley* (1873) L. R. 8 Q. B. 112, per Blackburn, J.; and see per Chitty, J., *Guy v. Churchill* (1888) 40 Ch. D. at p. 488.

8. 23. illegal and void whether the assistance (*w*) to be furnished consist of money, or, it seems, of professional assistance, or both (*x*). They are in practice often found to be also disputable on the ground of fraud or undue influence as between the parties (*y*).

There is no rule of law to forbid the purchase of property of which the title is or may be disputed, but the law does not, therefore, sanction mere speculative traffic in rights of action (*z*). To which class a given transaction belongs, in a case where doubt is at first sight possible, seems to be a question of fact rather than of law.

The specific rules of English law against maintenance and champerty have not been adopted in British India (*a*); neither are substantially similar rules applicable in any other way (*b*); but the principle, so far as it rests on general grounds of policy, is regarded as part of the law of "justice, equity, and good conscience" to which the decisions of the Court should conform. The leading judgment to this effect is in *Fischer v. Kamala Naicker* (*c*), an appeal from the Sudder Dewanny Adawlut, Madras. There the judicial Committee observed: "The Court seem very properly to have considered that the champerty, or, more properly, the maintenance into which they were inquiring, was something which must have the qualities attributed to champerty or maintenance by the English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (*d*).

(*w*) There must be something more than simply communicating information: *Rees v. De Bernardy* [1896] 2 Ch. 437, 446.

(*x*) *Stanley v. Jones* (1831) 7 Bing. 369; 33 R. R. 513, may be considered the leading modern case; *Re Attorneys and Solicitors Act* (1875) 1 Ch. D. 573.

(*y*) *E. g. Rees v. De Bernardy* [1896] 2 Ch. 437.

(*z*) See the Transfer of Property Act, 1882, s. 6 (*e*). By the customs of the Kachins, a tribe on the north-east frontier of Burma, claims for unliquidated damages are or were freely assignable; see L. Q. R. ix. 97.

(*a*) *Chedambara Chetty v. Renja Krishna* (1874) L. R. 1 Ind. Ap. 241; 13 B. L. R. 509; *Ram Coomar Coondoo v. Chunder Cantu Mookerjee* (1876) L. R. 4 Ind. Ap. 23; 2 Cal. 233.

(*b*) *Bhagwat Dayal Singh v. Debi Dayal Sahu* (1907) 35 Cal. 420; L. R. 35 Ind. Ap. 48, 56.

(*c*) (1890) 8 M. L. A. 170, where it was stated that an assignment by an agent to his principal of his interest in an agreement entered into in his name, but on behalf of the principal, was not champertuous.

(*d*) 8 M. L. A.

Adverting to these observations in a later case (e), the same Committee said: "It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England; but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the hindering nature of such agreements there." In *Bhagwat Dayal Singh v. Debi Dayal Sahu* (f), which is the latest Privy Council decision on the subject, the Judicial Committee clearly laid it down that an agreement champertous according to English law was not necessarily void in India; it must be against public policy to render it void here. A present transfer of property for consideration by a person who claims it as against another in possession thereof, but who has not yet established his title thereto, is not for that reason opposed to public policy (g). Nor is it opposed to public policy merely because the payment of the major part of the consideration is made to depend on the transferee's success in the suit to be brought by him to recover the property (h). Similarly agreements to share the subject of litigation if recovered in consideration of supplying funds to carry it on are not in themselves opposed to public policy (i). "A fair agreement to supply funds to carry on a suit in consideration of having a share of the property if recovered ought not to be regarded as being *per se* opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice and necessary to resist oppression that a suitor who had a just title to property and no means except the property itself should be assisted in this manner. But agreements of this kind ought to be carefully watched and when found to be extortionate and unconscionable so as to be inequitable against the party, or to be made, not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by

(e) *Ram Coomarr Coondoo v. Chunder Canto Mookerjee* (1876) 2 Cal. 233; L. R. 4 Ind. Ap. 23.

(f) (1908) 35 Cal. 420; L. R. 35 Ind. Ap. 48.

(g) *Achal Ram v. Kazim Husain Khan* (1905) 27 All. 271; L. R. 32 Ind.

Ap. 113, as explained in *Bhagwat Dayal Singh v. Debi Dayal Sahu*, *supra*.

(h) *Bhagwat Dayal Singh v. Debi Dayal Sahu*, *supra*.

(i) *Kunwar Ram Lal v. Nil Kanth* (1893) L. R. 20 Ind. Ap. 112.

8. 23. abetting and encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to them" (j). But though the Courts will not give effect to agreements "got up for the purpose merely of spoil or of litigation," they may in a proper case award compensation for legitimate expenses incurred by the lender to enable the borrower to carry on the lawsuit (k). Thus where, in consideration of the plaintiff agreeing to defray the expenses of prosecuting the defendant's suit to recover a certain property, the defendant agreed to transfer to the plaintiff, in one case nine annas share of the property (l), in another two annas share (m), and in a third eight annas share (n), it was held that the agreement was extortionate and inequitable, and the plaintiff was awarded the expenses legitimately incurred by him with interest. But mere inadequacy of consideration is not of itself sufficient to render a transaction champertous (o). An agreement for the purchase of a property *pendente lite* which entitled the purchaser to cancel the agreement in the event of the suit being decided against the vendor so as to leave the vendor no interest in the property is not champertous (p). Similarly an assignment for a second time by the mortgagor of his equity of redemption previously assigned to another by an unregistered document is not champertous, though the transaction may be one not commendable in conscience (q). A sale for Rs. 50 of property worth Rs. 150 which the

(j) *Ram Coomur Coondoo v. Chander Canto Mookerjee* (1876) L. R. 4 Ind. Ap. 23; 2 Cal. 233; *Baldeo Sahai v. Harbans* (1911) 33 All. 626. The point actually decided in *Ram Coomur Coondoo's* case was that a suit cannot lie at the instance of a successful defendant in a former suit to recover the costs of that suit from a party who advanced funds for the prosecution of the suit to the plaintiff therein, even though the advances may have been made under an agreement champertous and unconscionable in its nature, and though that party was the real actor and had an interest in that suit.

(k) *Kunwar Ram Lal v. Nil Kanth* (1893) L. R. 20 Ind. Ap. 112; *Dhallu v. Jivan Singh* (1894) Panj. Rec. no. 79; *Stewart v. Ram Chand* (1906) Panj. Rec. no. 26.

(l) *Ibid.*

(m) *Raja Mahkam Singh v. Raja Rap Singh* (1893) L. R. 20 Ind. Ap. 127; 15 All. 352, in appeal from *Chunni Kaur v. Rap Singh* (1888) 11 All. 57.

(n) *Husain Baihak v. Rahmat Husain* (1888) 11 All. 128. See also *Harival-abbhas v. Bhai Jivanji* (1902) 26 Bom. 689.

(o) *Gurusami v. Subbaraya* (1888) 12 Mad. 118; *Sira Ramayya v. Ellamma* (1899) 22 Mad. 310.

(p) *Ahmelbhoy Hubibhoy v. Vallee bhoy Cassumbhoy* (1884) 8 Bom. 323, 333, 334.

(q) *Gopal Ramchandra v. Gangaram* (1889) 14 Bom. 72, followed by the High Court of Madras in the case of a similar transaction in *Ramanuja v. Narayana* (1895) 18 Mad. 374.

vendor had previously transferred by way of gift to another person is not champertous (r). And where a patnidar, having a claim against the defendant for Rs. 13,099, sold fourteen annas share of his claim to another for Rs. 4,000, it was held in a suit by the patnidar and his assignee to recover Rs. 13,099 from the defendant that the sale was not champertous (s). But where the liquidator of a company compromised a claim of the company amounting to Rs. 1,61,500 for a tenth part of its amount on the representation of the debtor's friends that he could not pay more, and after about ten years assigned the same claim to a third person who was neither a creditor nor shareholder of the company, but a complete outsider as regards all matters connected with the company, it was held in a suit brought by the assignee to have the compromise declared void on the ground of fraud that the suit was not maintainable, as the assignment was effected with a view to litigation, and was, therefore, champertous in its nature (t). Sargent, J., said: "The case is, therefore, the simple one of a stranger officiously interfering for reasons of his own, and in no way at the request or even suggestion of the company or liquidator, in a matter in which he has no connection whatever, with the sole object of enabling himself to dispute transactions which occurred ten years ago, and in which, independently of the assignment of those claims, he has no interest whatever, so far at least as appears on the plaint." In a recent Privy Council case, A. claimed to be entitled to a taluq by succession, of which B. had entered into possession. Not having money to establish his title to the taluq by suit, A. sold a moiety of the taluq to R. for Rs. 1,50,000. In the sale deed it was stated that a lac of rupees had been paid down by R., and that the balance of Rs. 50,000 was to remain on deposit with R. to be expended in prosecuting the proposed suit and in paying Rs. 50 every month to A. and Rs. 20 to his mukhtar. A suit was then brought by A. and R. as co-plaintiffs against B. A. afterwards compromised with B., and withdrew from the suit. Then arose the question whether R. could sue alone, and it was held that he could. It was contended on behalf of B. that the statement in the sale deed that one lac had been paid to A. was not true, and that the

(r) *Siva Ramayya v. Ellamma* (1899) 22 Mad. 310. *Sukhal* (1888) 12 Bom. 559.

(t) *Goculdas v. Lakhmidas* (1879) 3 Bom. 402.

(s) *Abdool Hakim v. Doorga Proshad* (1879) 5 Cal. 4. See also *Tarachand v*

8. 23. sale to R. was void as being champertous. Their Lordships, after observing that the statement as to the payment of one lac was not in accordance with the fact, said : " Of course, at the first blush, the untrue statement throws suspicion upon the whole transaction. But after all, so long as the deed stands, it is no concern of [B.] that [A.] may have a grievance against [R.] on the score of a misstatement in an instrument to which [B.] is no party. [A.] himself has taken no steps to impeach the deed. On the contrary, in the course of the two years that elapsed between the date of the deed and the institution of the suit, [A.] more than once affirmed the transaction. . . . Apart from the untrue recital in the sale deed there seems to be no flaw in the transaction. Without assistance [A.] could not have prosecuted his claim. There was nothing extortionate or unreasonable in the terms of the bargain. There was no gambling in litigation. There was nothing contrary to public policy. Their Lordships agree with the judgment of the Court of the Judicial Commissioner that the transaction was a present transfer by [A.] of one moiety of his interest in the estate, giving a good title to [R.] on which it was competent for him to sue " (u). In *Raja Rai Bhagvat Dayal Singh v. Debi Dayal Sahu* (v) which is the latest Privy Council case on the subject, a Hindu widow sold to one X. certain properties which she had inherited from her son. The sale, it was alleged, was without legal necessity. On the death of the widow the reversioners who were refused possession by X. executed a sale deed in favour of one R. by which they purported to sell their rights in the properties, which were worth Rs. 3,00,000 to R. for Rs. 52,600, of which, however, only Rs. 600 was paid down, the balance being left on deposit with R. " on this condition, that the vendors should get the whole of the consideration in case the whole of the property should be recovered, and, in the event of recovery of a portion of the property sold, a portion of the consideration money in proportion thereto." In a suit by R. against X. for possession of the property, it was held by the High Court of Calcutta that the sale was void as being champertous, that no title passed to R., and that he was not therefore entitled to maintain the suit (w). On appeal it was held by

(u) *Achal Ram v. Kazim Husain Khan* Ind. Ap. 48.

(1905) 27 All. 271 ; L. R. 32 Ind. Ap. 113.

(v) See *Debi Doyal Sahoo v. Thakuraj*

Bhau Pertap (1903) 8 C. W. N. 408.

(w) (1908) 35 Cal. 420 ; L. R. 35

the Judicial Committee that though the agreement was of a generally champertous character, it was not void on that account, nor was it opposed to public policy and void by reason of the stipulation relating to the payment of the consideration. As to X.'s contention that the assignment by the reversioners to R. was unfair and unconscionable, it was held that, X. not being a party to the assignment, it was not open to him to question the transaction on that ground. In the course of the judgment their Lordships said: "For the respondents it was holdly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases, *Ram Coomur Coondoo v. Chunder Canto Mookerjee* (x), *Kunwar Ram Lal v. Nil Kanth* (y), *Lal Achal Ram v. Raja Karim Husain Khan* (z), before this Board, a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which certainly would have been void if champerty avoided transactions in India.

"It was further argued that the transaction in question was contrary to public policy and void on that ground, by reason of the provision as to payment of the purchase-money by the first appellant to the second and third. The purchase-money was fixed at Rs. 52,600, of which Rs. 600 was to be paid down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

"It was further said, and this was relied upon in the Courts of India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between assignor and assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In

(x) (1876) 2 Cal. 233; L. R. 4 Ind. Ap. 23.

(z) (1900) 27 All. 271; L. R. 32 Ind. Ap. 113; 9 C. W. N. 477.

(y) (1893) L. R. 20 Ind. Ap. 112.

- S. 23.** the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present action. Their Lordships are therefore of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail."

Agreements between legal practitioners subject to the Legal Practitioners Act, 1879, and their clients making the remuneration of the legal practitioner dependent to any extent whatever on the result of the case in which he is retained are illegal as being opposed to public policy (a).

4. **Interference with course of justice.**—Various agreements not open to objection on the ground of champerty, nor always obviously wrong in themselves, have been held void as attempting to interfere with the powers and discretion of the regular Courts in administering justice. So much of this doctrine as it was thought proper to preserve in British India will be found in s. 28, below.

5. **Marriage brokerage contracts.**—Agreements to procure marriages for reward (b) are undoubtedly void by the common law, on the ground that marriage ought to proceed, if not from mutual affection, at least from the free and deliberate decision of the parties with an unbiassed view to their welfare. In England, however, this topic is all but obsolete. It is nearly a century since any case of the kind, except the recent one cited in the last note, has been reported in England or Ireland. But such questions have come before Indian Courts in several modern cases, with not quite uniform results. In all those cases, it will be observed, the parties to the suit have been Hindus, a community in which the consent of the marrying parties has rarely, if ever, anything to do with the marriage contract, which is generally arranged by the parents or friends of the parties before they themselves are of an age to give a free and intelligent consent (c). The consent of parties

(a) *Ganga Ram v. Devi Das* (1907) Punj. Rec. no. 61.

(b) Whether general or specific: *Hermann v. Charlesworth* [1905] 2 K. B. 123, C. A., reversing the judgment of a Divisional Court who had held that only agreements to procure marriages with specified persons were illegal.

(c) *Cp. Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (1896) 21

Bom. 23, where it is laid down that the contract for the marriage of Hindu children under Hindu law is made exclusively by the parents. It is settled (following the analogy of English law) that specific performance of a Hindu parent's or guardian's contract to give him a child in marriage will not be granted; the only remedy is in damages. See *Re Gunput Narain Singh* (1875) 1 Cal. 74.

not being an essential condition in the Hindu marriage contract, and the Asura form of marriage being still recognised as a valid form, it has been held by the High Court of Allahabad (d), following an earlier decision of the Madras High Court (e), that every agreement to pay money to the father or guardian of a girl in consideration of his consent to the marriage of the girl is not unlawful, and that each case must be judged by its own circumstances. "Where the parents of the girl are not seeking her welfare, but give her to a husband, otherwise ineligible, in consideration of a benefit to be secured to themselves, an agreement by which such benefit is secured is, in our opinion, opposed to public policy and ought not to be enforced" (f). On the other hand, it has been held by the High Courts of Bombay (g) and Calcutta (h), and recently also by a Full Bench of the Madras High Court (i), that an agreement to pay money to the parent or guardian of a minor, in consideration of his consenting to give the minor in marriage, is void as being opposed to public policy, and the same view has been taken by the Punjab Chief Court (j). If such an agreement is void, it follows that if the defendant refuses in breach of the agreement to give his daughter in marriage to the plaintiff's son, the plaintiff cannot recover the stipulated sum from the defendant as damages for breach of the contract, even if the amount has been described in the agreement as *peheramni* to be given to the bridegroom's father (k). And it also follows that if the marriage is performed, and the defendant fails to pay the agreed amount, the plaintiff cannot maintain a suit to recover it from the defendant (l). But where the agreed sum or a

(d) *Baldeo Sahai v. Jumna Kummar* (1901) 23 All. 495; *Girdhari Singh v. Neeladhar Singh* (1912) 10 All. L. J. 159.

(e) *Visvanathan v. Saminathan* (1889) 13 Mad. 83.

(f) 23 All. 495, at pp. 496, 497.

(g) *Dholidas v. Fulchand* (1897) 22 Bom. 658; *Dulari v. Vallabdas* (1888) 13 Bom. 126.

(h) *Baldeo Das v. Mohamaya* (1911) 15 C. W. N. 447.

(i) *Kalavangunta Venkata v. Kalavangunta Lakshmi* (1908) 32 Mad. 185.

(j) *Wairimal v. Ballia* (1889) Punj. Rec. no. 128; *Hira v. Bhandari* (1892)

Punj. Rec. no. 112; *Kundan Lal v. Nathu* (1880) Punj. Rec. no. 110.

(k) *Dholidas v. Fulchand* (1897) 22 Bom. 658. See also *Dulari v. Vallabdas* (1888) 13 Bom. 126; *Kalavangunta Venkata v. Kalavangunta Lakshmi* (1908) 32 Mad. 185.

(l) *Baldeo Das v. Mohamaya* (1911) 15 Cal. W. N. 447; *Baldeo Sahai v. Jumna Kummar* (1901) 23 All. 495. The case of *Ranee Lallun v. Nobin Mohan* (1876) 25 W. R. 32, was a peculiar one, the agreement in that case having been acted on for fifty years.

8. 23. portion thereof has been paid by the plaintiff in advance and the suit is brought to recover back the amount on failure of the defendant to give the bride in marriage, the plaintiff is entitled to a decree for the same (m). And it has been held by the High Court of Madras that a marriage brocage agreement being unlawful, a plaintiff who has paid money in advance is entitled to recover it back from the defendant though he himself may have broken the contract by refusing to give the bride in marriage (n). There is absolutely no doubt that if any present of ornaments has been made by the father or the guardian of the bridegroom to the bride the same could be recovered by the former if the father of the bride in breach of the contract gives away the girl in marriage to another (o).

It has been held by the Madras High Court that there is no distinction in principle between an agreement between A. and B. that B.'s daughter shall marry A.'s son on payment of a sum of money by A. to B. and an agreement between A. and B. that B.'s daughter shall marry A.'s son and that, if she fails to do so, B. shall pay a sum of money to A. In such case B. has a pecuniary interest in bringing about the marriage. In the one case if the event takes place, he receives money. In the other case, if the event does not take place, he has to pay money. If the former agreement is void as being contrary to public policy as held in the full Bench case cited above, the latter agreement, it was held, is equally so (p).

It has been held by the Punjab Chief Court that a family arrangement of intermarriages of sons and daughters of various families known as *bil marwaza* amongst persons of the same class, by which the family A. gives a girl to be taken as a wife on equal terms into a family B., and a girl of the family B. is at the same time given as a wife into family A., stands on a totally different footing from what is really a sale of the girl, and is not therefore void as opposed to public policy. Where a girl, therefore, of family A. is given as a wife in family B. in virtue of

(m) *Juggessur v. Panchcouree* (1870) 14 W. R. 154; *Ram Chand v. Audaito Sen* (1884) 10 Cal. 1054; *Gulabchand v. Fulbai* (1909) 33 Bom. 411, where the marriage could not take place because of the death of the plaintiff's son; see contra *Girdhari Singh v. Neeladhar Singh* (1912) 10 All. L. J. 159.

(n) *Srinivasa v. Sesha* (1918) 41 Mad. 197.

(o) *Rambhat v. Timmayya* (1892) 16 Bom. 673; *Girdhari Singh v. Neeladhar Singh* (1912) 10 All. L. J. 159.

(p) *Devarayan v. Mutturaman* (1914) 37 Mad. 393.

such an arrangement, but family B. refuses to give a boy of the family as a husband in family A., a suit will lie for damages for breach of the contract. But since such arrangements are not held in highest repute, the Court will not award heavy damages (q). S. 24

There is absolutely no doubt that where the agreement is by a person to pay money to a stranger hired to procure a wife for him, it is opposed to public policy and will not be enforced by any of the Indian Courts (r). An agreement by A. to pay money to B. if B. induces his daughter to take A. in adoption is as much against public policy as a marriage brokerage contract, and B. is not entitled to recover on the agreement (s).

6. **Agreements tending to create interest against duty.**—One of the reasons suggested for not enforcing agreements to reward parents for giving their children in marriage is that such agreements tend to a conflict of interest with duty. The same principle is applied by the common law to dealings of agents and other persons in similar fiduciary positions with third persons. An agent must not deal in the matter of the agency on his own account without his principal's knowledge. In the present Act the rules on this head are embodied in the chapter on Agency (t), and will accordingly be considered in that place. Certain rules which we shall find in the chapter on Indemnity and Guarantee (u) rest on similar grounds of equity. At one time the High Court of Allahabad held that an agreement by a Patwari or Kanungo in Government service for the purchase of land situated within his circle or for the acquisition of any other interest therein was void on the ground that such an agreement created an interest which would conflict with his duty as Patwari or Kanungo (v). But these decisions have since been overruled by a Full Bench of the same Court, holding that such agreements are perfectly good (w). It has been held by the High Court of Calcutta that

(q) *Amir Chand v. Ram* (1903) Punj. Rec. no. 50.

(u) ss. 133, 137.

(r) *Vaithyanathan v. Gungarazu* (1893) 17 Mad. 9; *Pitamber v. Jaggiwan* (1884) 13 Bom. 131.

(v) *Shiam Lal v. Chhaki Lal* (1900) 22 All. 220; *Sheo Narain v. Mala Prasad* (1904) 27 All. 73.

(s) *Kothanda v. Thesu Reddiar* (1914) 27 Mad. L. J. 416.

(w) *Bhagwan Dei v. Murari Lal* (1917) 39 All. 51 [F. B.]; *Kamala Devi v. Gur Dayal* (1917) 39 All. 58

(t) ss. 215, 216.

8. 23. if a person enters into a contract with a public servant which to his knowledge might cast upon the public servant obligations inconsistent with public duty the contract is void (x).

7. Sale of public offices.—Traffic by way of sale in public offices and appointments obviously tends to the prejudice of the public service by interfering with the selection of the best qualified persons; and such sales are forbidden in England by various statutes said to be in affirmance of the common law (y). There are no recent English authorities. The cases in India on this branch of the subject have arisen principally in connection with religious offices. It has been held by the High Court of Madras that the sale of the office of a *sebai* is invalid (z). The High Court of Bombay, while affirming the invalidity of an alienation of the office to a stranger, upholds an alienation made in favour of a member of the founder's family standing in the line of succession (a). Similarly the office of *mutwali* of a *wakf* is not transferable (b). And it has been held by the Privy Council that a custom allowing the sale of the office of *uraller* (trustee) of a Hindu temple for the pecuniary advantage of the trustee, even if it was established, would be bad in law (c). These decisions are based upon the principle that the interest of the public might suffer if bargains relating to public offices are upheld, as their effect is to prevent such offices being filled by the best available persons. Where, however, the claimants to the office of *ojha* (high priest) of the temple of Baidyanath were members of a family group, and one claimed the office on the ground that it was elective, and the other that it was hereditary, it was held by the High Court of Calcutta that a compromise by which one of the claimants relinquished his claim in favour of the other in consideration of the latter paying

(x) *Sitarampur Coal Co., Ltd. v. Colley* (1908) 13 Cal. W. N. 59. It is not easy to see what the party's knowledge has to do with it. The rule is for the protection of the public interest.

(y) See Pollock, Contract, 343. The statute 49 Geo. III. c. 126, s. 3, is still in force in the Presidency towns.

(z) *Narasimma v. Anantha Bhatta* (1881) 4 Mad. 391; *Kuppa Gurukul v. Dora Sami* (1882) 6 Mad. 76. See also *Rajah Vurmah v. Ravi Vurmah* (1876)

1 Mad. 235; L. R. 4 Ind. Ap. 76; *Gnanasambanda Pandara Sannadhi v. Velu Pandaram* (1900) 23 Mad. 271; L. R. 27 Ind. Ap. 69.

(a) *Mancharam v. Pranshankar* (1892) 6 Bom. 298.

(b) *Wahid Ali v. Ashruff Hossain* (1882) 8 Cal. 732.

(c) *Rajah Vurmah Valia v. Ravi Vurmah Kunhi* (1876) 1 Mad. 235. The proper name of the office seems to be *sirdam* (Wilson's Glossary);

Rs. 2,400 annually out of the *charao* offerings to the idol was not in any way against public policy (*d*) [See Transfer of Property Act, 1882, s. 6 (*f*)]. S. 23.

An agreement to pay money to a public servant to induce him to retire and thus make way for the appointment of the promisor is virtually a trafficking with reference to an office, and is void under this section. In the language of the English law, such an agreement is an office brokerage agreement invalid as opposed to public policy (*e*) (see illustration (*f*) to the section, p. 143, above). Where money is paid under such an agreement, it cannot be recovered back from the defendant, though he has failed to carry out his promise to procure employment for the plaintiff in public service (*f*).

8. **Agreements tending to create monopolies.**—Agreements having for their object the creation of monopolies are void as opposed to public policy (*g*).

9. **Agreement by client to remunerate his pleader's clerk.**—An agreement by which a litigant binds himself to pay a sum of money to his pleader's clerk for giving special attention to his legal business which the pleader is bound to see to in consideration of his fee is opposed to public policy, and consequently cannot be enforced (*h*).

10. **Agreement not to bid.**—An agreement between persons not to bid against one another at an auction sale is not necessarily unlawful (*i*).

Waiver of illegality.—Agreements which seek to waive an illegality are void on grounds of public policy (*j*). “Whenever an illegality appears, whether from the evidence given by one side or the other, the disclosure is fatal to the case. A stipulation of the strongest form to

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| (<i>d</i>) <i>Girijanund v. Sailajanund</i> (1896) 23 Cal. 645. | have been reported at all). |
| (<i>e</i>) <i>Saminatha v. Muthusami</i> (1907) 30 Mad. 530. | (<i>h</i>) <i>Suryanarayana v. Subbayya</i> (1917) 41 Mad. 471. |
| (<i>f</i>) <i>Ledu v. Hiralal</i> (1916) 43 Cal. 115. See this case commented on in <i>Srinivasa v. Sessa Ayyar</i> (1918) 41 Mad. 197, at pp. 200, 202. | (<i>i</i>) <i>Mahomed Meera v. Savvasi Vijaya</i> (1900) 23 Mad. 227, L. R. 27 I. A. 17; <i>Hari v. Naro</i> (1894) 18 Bom. 342; <i>Doorga Singh v. Sheo Pershad</i> (1889) 18 Cal. 194, 199. |
| (<i>g</i>) <i>Somu Pillai v. The Municipal Council, Mayavaram</i> (1905) 28 Mad. 520; <i>Mackenzie v. Rameshwar Singh</i> (1916) 1 Pat. L. J. 37 (a case which ought not to | (<i>j</i>) <i>Dhanukdhari v. Nathima</i> (1907) 11 C. W. N. 848; <i>La Banque v. La Banque</i> (1887) 13 App. Ca. 111. |

8. 23. waive the objection would be tainted with the vice of the original contract and void for the same reasons. Wherover the contamination reaches, it destroys" (k).

Pleadings.—The facts showing illegality must be pleaded, but when the illegality appears from the plaintiff's own evidence, or is otherwise duly brought to the notice of the Court, it is the duty of the Court to give effect to the fact thus brought to its notice, and to give judgment for the defendant, although the illegality is not raised by the pleadings (l). See Code of Civil Procedure, O. 6, r. 8, and O. 8, r. 2.

Other statutory provisions of similar effect: 1. *Trusts Act*.—The provisions of this section as to agreements are strengthened or supplemented by some other enactments. The Indian Trusts Act II of 1882 provides by s. 3 that all expressions used therein, and defined in the Contract Act, shall be deemed to have the meanings respectively attributed to them by the Contract Act. S. 4 provides that a trust may be created for any lawful purpose, and that the purpose of a trust is lawful unless it is (a) forbidden by law, or (b) is of such a nature that, if permitted, it would defeat the provisions of any law, or (c) is fraudulent, or (d) involves or implies injury to the person or property of another, or (e) the Court regards it as immoral or opposed to public policy. The section further enacts that every trust of which the purpose is unlawful is void.

2. *Transfer of Property Act IV of 1882*.—S. 6 (h) of this Act provides that no transfer can be made of property of any kind for an "illegal purpose."

3. *Indian Evidence Act I of 1872*.—Where the consideration or object of an agreement is alleged to be unlawful, oral evidence may be adduced to prove the same though the agreement is reduced to the form of a document (s. 92, proviso (1).).

4. *Specific Relief Act I of 1877*.—As to judicial rescission under s. 35 (b) see the special commentary in our concluding chapter.

(k) Per Field, J. (Supreme Court, *Alice Mary Hill v. William U. S.*), in *Oscanjan v. Winchester*, 13 *Clarke* (1905) 27 All. 268. Otto, 261; *Hall v. Capell*, 7 *Wallace*, 542.

Void Agreements.

S. 24.

24.—If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Agreements void, if considerations and objects unlawful in part.

Illustration.

A. promises to superintend, on behalf of B., a legal manufacture of indigo, and an illegal traffic in other articles. B. promises to pay to A. a salary of 10,000 rupees a year. The agreement is void, the object of A.'s promise, and the consideration for B.'s promise, being in part unlawful.

Entire or divisible agreements.—This section is an obvious consequence of the general principle of s. 23. A promise made for an unlawful consideration cannot be enforced, and there is not any promise for a lawful consideration if there is anything illegal in a consideration which must be taken as a whole. On the other hand, it is well settled that if several distinct promises are made for one and the same lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a distinct consideration which is wholly lawful can be found for the promise called in question. “The general rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good” (m). Further specific reference to English cases where the rule has been recognised would be of no practical use for Indian purposes.

In Bengal an agreement between a zamindar and his tenant for the payment of an enhanced rent which exceeds the rent previously paid by the tenant by more than two annas in the rupee has been held void (n), as it directly contravenes the provisions of the Bengal Tenancy Act VIII of 1865. The Court will not in such a case sever the good part from the bad, and pass a decree for the good part, that is for so much of the enhanced rent as does not exceed the two annas in the

(m) Willes, J., in *Pickering v. Iffra-combe R. Co.* (1868) L. R. 3 C. P. at p. 250.

(n) *Kristodhone Ghose v. Brojo Gobindo Roy* (1897) 2 Cal. 895.

8. 24. rupee (o). To do so would be to create a new agreement between the parties. Similarly, where a part of a consideration for an agreement was the withdrawal of a pending criminal charge of trespass and theft, it was held that the whole agreement was void (p). Upon the same principle a suit will not lie upon a promissory note for an amount which included an item in respect of lotteries prohibited by law (q) or an amount in respect of gambling losses (r). Where A. promised to pay Rs. 50 per month to a married woman, B., in consideration of B. living in adultery with A. and acting as his housekeeper, it was held that the whole agreement was void, and B. could not recover anything even for services rendered to A. as housekeeper (s). Where, in consideration of A. agreeing to procure a divorce from her husband and marrying B., B. advanced to A. Rs. 300, of which part was alleged by B. to have been paid for expenses of procuring the divorce and part for A.'s ornaments, it was held that on A.'s failure to perform the contract B. was not entitled to recover from A. any part of the money advanced (t). Similarly, a suit will not lie to recover money advanced as capital for the purposes of a partnership which is partly illegal: A. holds a licence for the sale of opium and *ganja*. The *ganja* licence contains a condition prohibiting A. from admitting partners into the *ganja* business without the permission of the Collector. No such condition is embodied in the opium licence. B., who is aware of the prohibition, enters in a partnership agreement with A. both in the opium and *ganja* business without the leave of the Collector and pays A. Rs. 500 as his share of the capital. Disputes arise between A. and B. and B. sues A. for dissolution of partnership and for a refund of his Rs. 500. B. is not entitled to recover Rs. 500 or any part thereof, one of the objects of the agreement being to carry on *ganja* business in partnership. In such a case "it is impossible to separate the contract or to say how much

(o) Citing *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 235, 250; and *Baker v. Hedgecock*, 39 Ch. D. 520. 441.

(p) *Balgobind v. Bhaggu Mal* (1913) 35 All. 558.

(q) *Srirangachariar v. Ramasami Ayyangar* (1894) 18 Mad. 189; *Bindehari Prasad v. Lekhraj Sahu* (1916) 1 Pat. L. J. 48, 60; *Bani Ramchandra v Jayawanti* (1918) 42 Bom. 339.

(r) *Alice Mary Hill v. William Clarke* (1905) 27 All. 266.

(s) *Mussammat Roshun v. Muhammad* (1887) *Punj. Rec.* no. 46; *Bai Vijli v. Nansa Nagar* (1885) 10 Bom. 152.

(t) *Joseph v. Solano* (1872) 9 B. L. R.

capital was advanced for the opium and how much for the *ganja* " (u). S. 24.
 A. stands bail for B., who is charged with an offence, and as an indemnity for the bail takes from B. a sale deed of B.'s bouse and also a rent-note, whereby B. agrees thenceforward to occupy the house as A.'s tenant and to pay rent to him. A. cannot sue B. on the rent-note. "The sale deed and the rent-note are part and parcel of the same transaction," and "the rent-note is tainted with the same illegality which affects the sale deed" (v). Different consequences, however, may follow when a part of the consideration or "object" of an agreement is not illegal, but merely void in the sense that it is not enforceable in law. In such a case actual performance of such part may be a good consideration, though a promise to perform it would not have been. Thus a bond passed by a judgment debtor to the holder of a decree against him in consideration of the latter refraining from execution of the decree is void under s. 257A of the Civil Procedure Code, 1882, but not illegal. The decree-holder, therefore, on performing his part of the agreement, was held entitled to recover on the executed consideration (w), being in itself a voluntary lawful forbearance, though not upon the executory agreement. If the promise to postpone execution of the decree were illegal the whole bond would be tainted with illegality, and the judgment creditor would then have no right to enforce payment of the bond. But when the parties themselves treat debts void as well as valid as a lump sum, the Court will regard the contract as an integral one, and wholly void. Thus where a judgment debtor agreed to pay in a lump sum interest not awarded by a decree in addition to the sum decreed without the sanction of the Court it was held that, the promise to pay such interest being void under s. 257A of the Civil Procedure Code, 1882, the whole agreement was void (x). Section 257A has been omitted in the Code of 1908.

The provisions of this section must be distinguished from those of s. 57, below. In a Bengal case a Mahomedan husband agreed by a registered document that he would pay over to his wife whatever money he might earn, and that he would do nothing without her permission, and that if he did so she would be at liberty to divorce him

(u) *Gopalray v. Kallappa* (1901) 3 Bom. L. R. 164.

(v) *Laxmanlal v. Mulshankar* (1908) 32 Bom. 449.

(w) *Bank of Bengal v. Vyabhoj Gangji* (1891) 16 Bom. 618.

(x) *Davlatasing v. Pandu* (1884) 9 Bom. 176.

Sec. 24, 25. In a suit by the wife to recover from him his earnings it was held that, though the latter part of the agreement might be unlawful, the suit was one to enforce the legal part, and the Court gave a decree to the plaintiff for her maintenance at Rs. 12 per month, stating that the fair construction of the agreement was not that the husband was to pay every rupee he earned, but that he was entitled to a reasonable deduction for expenses which he must necessarily incur (*y*).

Indian Trusts Act, 1882.—S. 4 of that Act provides that where a trust is created for two purposes of which one is lawful, and the other unlawful, and the two purposes cannot be separated, the whole trust is void.

25.—An agreement made without consideration is void unless—

Agreement without consideration, void, unless it is in writing and registered.

(1) it is expressed in writing and registered under the law for the time being in force for the registration of [documents (*z*)], and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or something which the promisor was legally compellable to do; or unless

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases such an agreement is a contract.

(*y*) *Poonoo Bibee v. Fyz Buxsh* (1874) been substituted for the word "assurances" by the Repealing and Amending Act XII of 1891.
 15 B. L. R. App. 5:
 (*z*) The word "documents" has

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made. S. 25.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.

Illustrations.

(a) A. promises, for no consideration, to give to B. Rs. 1,000. This is a void agreement.

(b) A., for natural love and affection, promises to give his son, B., Rs. 1,000. A. puts his promise to B. into writing, and registers it. This is a contract.

(c) A. finds B.'s purse and gives it to him. B. promises to give A. Rs. 50. This is a contract.

(d) A. supports B.'s infant son. B. promises to pay A.'s expenses in so doing. This is a contract.

(e) A. owes B. Rs. 1,000, but the debt is barred by the Limitation Act. A. signs a written promise to pay B. Rs. 500 on account of the debt. This is a contract.

(f) A. agrees to sell a horse worth Rs. 1,000 for Rs. 10. A.'s consent to the agreement was freely given. The agreement is a contract notwithstanding the inadequacy of the consideration.

(g) A. agrees to sell a horse worth Rs. 1,000 for Rs. 10. A. denies that his consent to the agreement was freely given. The inadequacy of the consideration is a fact which the Court should take into account in considering whether or not A.'s consent was freely given.

Consideration.—This section declares, long after consideration has been defined (s. 2, sub-s. (d)), that (subject to strictly limited exceptions) (a) it is a necessary element of a binding contract. This has already been assumed in s. 10. The present section goes on to state the exceptional cases in which consideration may be dispensed with. It is curious that the Act nowhere explicitly states that mutual

(a) The rule of the common law made to treat consideration itself as a cannot be properly stated in this way; matter of form. This is paradoxical, for the formal contracts of English law, the essence of consideration is exchange which are binding by their form alone, of value regardless of any particular are older than the doctrine of considera- form. But these matters are of no prac- tion. Ingenious attempts have been tical importance in India.

8. 25. promises are sufficient consideration for one another, though it is assumed throughout the Act, and seems to be involved in the definitions of "agreement" and "reciprocal promises" in s. 2, sub-ss. (e) and (f) (see the commentary thereon, pp. 32, 33, above) (b).

The most obvious example of an agreement without consideration is a purely gratuitous promise given and accepted. Such a promise has no legal force unless it comes within the first class mentioned in the present section. But there are other less obvious cases; and they must be all the more carefully noted because neither the text nor the illustrations of this section throw any light on them. It is not enough that something, whether act or promise, appears, on the face of the transaction, to be given in exchange for the promise. That which is given need not be of any particular value; it need not be in appearance or in fact of approximately equal value with the promise for which it is exchanged (see commentary on explanation 2, below); but it must be something which the law can regard as having some value, so that the giving of it effects a real though it may be a very small change in the promisee's position; and this is what English writers mean when they speak of consideration as good, sufficient, or valuable. An apparent consideration which has no legal value is no consideration at all. A performance or promise of this kind is sometimes called an "unreal" consideration.

Forbearance and compromise as consideration.—Compromise is a very common transaction, and so is agreement to forbear prosecuting a claim, or actual forbearance at the other party's request, for a definite or for a reasonable time. It may seem at first sight that in all these cases the validity of the promise is doubtful. For the giving up, or forbearing to exercise, an actually existing and enforceable right is certainly a good consideration (c); but what if the claim is not well founded? Can a cause of action to which there is a complete defence be of any value in the eye of the law? If a man bargains for reward in consideration of his abandonment of such a cause of action, does he not really get something for nothing, even if he believes he has a good

(b) This section, it has been observed, is exhaustive: *Indran Ramaswami v. Anihappa Chettiar* (1906) 16 M. L. J. 422, at p. 426. This means, we presume, that an agreement made without con-

sideration is either enforceable under this section or not enforceable at all, which hardly seems to need authority.

(c) *Jagadindra Nath v. Chandra Nath* (1903) 31 Cal. 242.

case? The answer is that abstaining or promising to abstain from doing anything which one would otherwise be lawfully free to do or not to do is a good consideration, and every man who honestly thinks he has a claim deserving to be examined (*d*) is free to bring it before the proper Court, and have the judgment of the Court on its merits, without which judgment it cannot be certainly known whether the claim is well founded or not; for the maxim that every man is presumed to know the law, not a very safe one at best, is clearly inapplicable here. That which is abandoned or suspended in a compromise is not the ultimate right or claim of the party, but his right of having the assistance of the Court to determine and, if admitted or held good, to enforce it. "If an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong" (*e*). Forbearance to sue for or demand a merely honorary or customary debt may be a good consideration (*f*).

The principle thus stated is followed by the Indian Courts (*g*). Thus where after the expiration of the time fixed for completion of a mortgage the mortgagee declined to advance the money unless the mortgagor consented to pay interest from the date fixed for the completion, and the mortgagor agreed to do so, it was held that there was a good consideration for the agreement, though time was probably not of the essence of the original contract. The mortgagee believed in good faith that he was entitled to rescind at once, and the abandonment

(*d*) He need not have a positive opinion that it is justified; for its success may depend on facts not within his own knowledge, or on unsettled questions of law, or both. Oftentimes a man who is asked, "Is your cause just?" may quite fairly answer: "I see nothing against good conscience in it; whether it is good in law is exactly what I want the Court to tell me." These refinements, however, are perhaps fitter for the moralist than for the lawyer.

(*e*) Bowen, L.J., in *Miles v. New Zealand Alford Estate Co.* (1886) 32 Ch.

Div. 266, 291. *Cp. Wilby v. Elgee* (1875) L. R. 10 C. P. 497.

(*f*) *Goodson v. Grierson* [1908] 1 K. B. 701, C. A. Even a gaming debt which for some purposes would itself be an "illegal consideration" under the English Gaming Acts: *Hyams v. Stuart King* [1908] 2 K. B. 696, C. A.

(*g*) *Olati Pulliah Chetti v. Varadarajulu* (1908) 31 Mad. 474, at pp. 476, 477; *Krishna Chandra v. Hemaja Sankar* (1917) 22 Cal. W. N. 463 [where the claim was not *bona fide*].

8. 25. of his claim to do so was consideration enough for the mortgagor's agreement to his terms (*h*). An agreement in the nature of a compromise of a *bona fide* dispute as to the right of succession to a priestly office is not without consideration (*i*); nor is a mutual agreement to avoid further litigation invalid on this ground (*j*); nor a family arrangement providing for the marriage expenses of female members of a joint Hindu family on a partition between them of the joint family property (*k*); nor a promissory note in the nature of a compromise of a doubtful litigation passed by a tenant to the zemindar during the pendency of a suit brought by the zemindar against the tenant to eject him from his holding (*l*). But a pledge or promise of security for an existing debt is void unless there is some forbearance or undertaking by the creditor (such as not pressing for payment, or accepting a reduced rate of interest) in return for it. Thus where the drawer of a hundi became insolvent before it fell due, and the plaintiff, who was the holder, in due course applied to the acceptor to give security for payment at maturity, and the latter executed a mortgage "by way of collateral security bond," it was held that, the plaintiff not having entered into any undertaking whatever, he could not recover on the mortgage deed (*m*).

Promise to perform existing duty.—It is well settled in England that the performance of what one is already bound to do, either by general law or by a specific obligation to the other party, is not a good consideration for a promise; for such performance is no legal burden to the promisee, but, on the contrary, relieves him of a duty. Neither is the promise of such performance a consideration, since it adds nothing to the obligation already existing. Moreover, in the case of the duty being imposed by the general law, an agreement to take private reward for doing it would be against public policy. But

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| <p>(<i>h</i>) <i>Dadabhoj v. Pestonji</i> (1893) 17 Bom. 457. The plaintiff's right was really, it seems, to give the defendant notice that he would rescind if the defendant did not complete within a reasonable time; see at p. 465</p> <p>(<i>i</i>) <i>Girijanund v. Sailajanund</i> (1896) 23 Cal. 645, 665, 666; <i>Rameshwar Prosad v. Lachmi Prosad</i> (1904) 31 Cal. 111, 131—132; <i>Bhiva Mahadshet v. Shivaram</i></p> | <p><i>Mahadshet</i> (1899) 1 Bom. L. R. 495, 497.</p> <p>(<i>j</i>) <i>Bhima v. Ningappa</i> (1868) 5 B. H. C., A. C. J. 75.</p> <p>(<i>k</i>) <i>Anantanarayana v. Savithri</i> (1913) 36 Mad. 151.</p> <p>(<i>l</i>) <i>Ramkirpal v. Gaye Del</i> (1914) 12 All. L. J. 331.</p> <p>(<i>m</i>) <i>Manna Lal v. Bank of Bengal</i> (1876) 1 All. 309.</p> |
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before applying this rule we must be careful to ascertain that a legal duty does exist. A promise to remunerate a person named as executor (not out of the estate itself) if he accepted the office and performed the duties of executor is not had for want of consideration, since it is not a legal duty to accept the office (*n*) and perform those duties without claiming any remuneration. But a person served with a subpoena is legally bound to attend and give evidence in a court of law, and a promise to compensate him for loss of time or other inconvenience is void for want of consideration (*o*). Similarly an agreement by a client to pay to his vakil after the latter had accepted the *vakalatnama* a certain sum in addition to his fee if the suit was successful is without consideration (*p*). And it has been held by the High Court of Allahabad that a bond passed by a judgment debtor to the holder of a decree against him for the amount of the decree plus Rs. 3 paid for him for the stamp and registration charges of the bond is without consideration where the decree was made by a Court having no jurisdiction to make it, and the bond was passed to secure the release of the debtor from arrest (*q*).

But if a man, being already under a legal duty to do something, undertakes to do something more than is contained therein, or to perform the duty in some one of several admissible ways—in other words, to forego the choice which the law allows him—this is a good consideration for a promise of special reward (*r*).

If A. is already bound to do a certain thing, not by the general law, but under a contract with Z., it seems plain that neither the performance of it nor a fresh promise thereof without any addition or variation will support a promise by Z., who is already entitled to claim performance. For Z. is none the better thereby in point of law, nor A. any worse. But what if M., a third person not at present entitled to claim

(*n*) *Narayan v. Shajani* (1894) 22 Cal. 14. It was also argued, without success, that the agreement was against public policy as making it the executor's interest to prolong the administration of the estate against his duty.

(*o*) *Sashannah Chetti v. Ramasamy Chetti* (1868) 4 M. H. C. 7.

(*p*) *Ramchandra Chintaman v. Kalu*

Raju (1877) 2 Bom. 362. *Cp. Ganga Ram v. Devi Das* (1907) Punj. Rec. no. 61.

(*q*) *Banda Ali v. Banspat Singh* (1882) 4 All. 352.

(*r*) *England v. Davidson* (1840) 11 A. & E. 856; 52 R. R. 522 (reward to constable for services beyond duty); *Hartley v. Ponsonby* (1857) 7 E. & B. 872; 110 R. R. 867.

S. 25. anything, offers a promise to A. in consideration of (a) A.'s performance of his obligation to Z., or (b) A.'s promise to M. to perform that obligation? These questions have given rise to great difference of opinion in England and America (s). They do not seem to have been considered by Indian Courts. Such English authority there is favours the opinion that the performance is a good consideration; but the reasons given are not very clear, and seem to assume that both performance and promise must be good considerations in such a case, or neither (t). It is submitted, however, that on principle this assumption is not tenable. The test is whether there is any legal debt due to A., the supposed promisee. Now A.'s performance of what he already owes to Z. is no detriment to him, as has been pointed out; and indeed the resulting discharge of his liability seems rather to be an advantage; and therefore it is no consideration for a new promise by any one. But A.'s promise to M. to do something, though he may have already promised Z. to do that same thing, is the undertaking of a new obligation to a new party. There is no reason why it should not be made binding by M.'s counter-promise, as in any other case of a contract by reciprocal promises, unless the law forbids the same performance to operate in discharge of two distinct contracts. There is no positive authority for any such rule of law, and when we bear in mind that in a contract by reciprocal promises the promises are the consideration for each other, and not the performance, no such rule appears to be demanded or warranted by principle.

Whatever resolution of the speculative question may ultimately prevail, the difficulty may be removed, in the case of performance, by the slightest appreciable addition to the performance already contracted for, and, in the case of promise, by A's new undertaking to M. being or including an undertaking not to rescind or vary, without M.'s consent, his existing contract with Z.

Transfer of immoveable property.—This section has been held to apply to cases of sale and mortgage of immoveable property. Thus

(s) See Pollock on Contract, 8th ed. 195—199; Anson, 14th ed. 116—118, L. Q. R. xx. 9; Harv. Law Rev. xvii. 71; Loake, 6th ed. 439, 440. *quere* whether there was in fact any intention to create a legal obligation at all (see the dissenting judgment of Byles, J.); *Scotson v. Pegg* (1861) 6 H. & N.

(t) *Shadwell v. Shadwell* (1860) 9 C. B. N. S. 159; 127 R. R. 604; but 295; 123 R. R. 516, and Pref.

in *Manna Lal v. Bank of Bengal* (u) the Allahabad High Court held a mortgage effected by a duly registered deed to be void for want of consideration under this section. Similarly in *Tatia v. Babaji* (v) Fulton, J., held that a sale effected by a duly registered deed under which the purchaser had entered into possession was void for want of consideration under this section. Farran, C.J., however, was inclined to the opinion that conveyances of land in the Mufassal perfected by possession or registration, where the consideration expressed in the conveyance to have been paid had not in fact been paid, could not be put in the same category as agreements void for want of consideration (w). The first of these two cases was decided before the Transfer of Property Act IV of 1882 was enacted. As regards the other case, that Act was not yet extended to the Bombay Presidency when the deed of sale was executed. It would seem, however, that the result would be the same under s. 54 of that Act read with s. 4. The latter section declares that the chapters and sections relating to contracts in that Act shall be taken as part of the Contract Act.

S. 25.

Negotiable Instruments.—The law merchant has almost—but, as it is held by something very near a fiction, not quite—made an exception to the rule of consideration in the case of negotiable instruments, or rather established another and independent rule. The Negotiable Instruments Act XXVI of 1881, s. 118, affirming the well-settled general law, enacts that until the contrary is proved the presumption shall be made that every negotiable instrument was made or drawn for consideration; and that every such instrument, when it has been accepted, endorsed, negotiated, or transferred, was accepted, endorsed, negotiated, or transferred for consideration. The second branch of the above rule stands as illustration (e) to s. 114 of the Evidence Act of 1872.

We now come to the exceptional cases in which consideration is dispensed with.

Registered writing.—The English doctrine that the “solemnity of a deed” is of itself sufficient to make a promise expressed in a sealed

(u) (1876) 1 All. 309.

(w) 22 Bom. at p. 183.

(v) (1896) 22 Bom. 176, 181, 182.

- S. 25. writing valid has never been received in British India (x). The Act does not allow any form alone to dispense with consideration, but only writing and registration coupled with the motive of natural love and affection between nearly related parties. The words "near relation" have not been judicially construed. The Courts would, it need hardly be said, have to construe them uniformly without regard to variations in the reckoning of degrees of kindred, for the purposes of inheritance or the like, in different personal laws or customs (y). A registered agreement between a Mahomedan husband and his wife to pay his earnings to her is within the provisions of cl. 1 of the section (z). So is a registered agreement whereby A. on account of natural love and affection for his brother, B., undertakes to discharge a debt due by B. to C. In such a case, if A. does not discharge the debt, B. may discharge it, and sue A. to recover the amount (a). But an agreement in writing and registered, whereby a member of an undivided Hindu family, without any valuable consideration, renounces all right to the family property in favour of the remaining coparceners, is void unless it is executed for natural love and affection (b). It is not to be supposed that the nearness of relationship necessarily imports natural love and affection. Thus where a Hindu husband executed a registered document in favour of his wife, whereby, after referring to quarrels and disagreement between the parties, the husband agreed to pay her for a separate residence and maintenance, and there was no con-

(x) *Kaliprasad Tewari v. Raja Sahib Prahlad Sen* (1869) 2 B. L. R. (P. C.) at p. 122. In England the formal operation of a deed is much older than the doctrine of consideration. It is therefore erroneous to say, as text-books commonly did at one time, that the formality "imports a consideration." On the contrary, the doctrine of consideration was introduced only when informal contracts were made actionable by a series of ingenious fictions; but this is not material for Indian purposes.

(y) *Jafar Ali v. Ahmed Ali* (1868) 5 B. H. C., A. C. J. 37, where it was held,

before the Act, that the relation of cousins would not support a voluntary agreement, though registered, throws no light on the possible construction of the Act; for by the Common Law, which the Court apparently followed, no degree of kinship, however near, would suffice.

(z) *Poonoo Bibee v. Fye: Bukah* (1874) 15 B. L. R. App. 5.

(a) *Venkatasamy v. Rangasamy* (1903) 13 Mad. L. J. 428.

(b) *Appa Pillai v. Ranga Pillai* (1892) 6 Mad. 71. The facts of the case did not show that the agreement was made on account of natural love and affection.

eration moving from the wife (c), it was held in a suit by the wife S. 25. sought on the agreement that the agreement was void as being made without consideration. It was further held that the agreement could not be said to have been made on account of natural love and affection, the recitals in the agreement being opposed to that view (d). It is difficult to reconcile with the last case the decision of the Bombay High Court in *Bhiva Mahadshet v. Shivaram Mahadshet* (e). In that case A. sued his brother B. upon a registered instrument whereby B. had agreed to give A. one-half of certain property. It appeared that A. had previously sued B. to recover that share from him, alleging that the property was ancestral, but the suit was dismissed on B. taking a special oath that the property was not ancestral. It further appeared on the plaintiff's own admissions that the brothers had long been on bad terms. Upon these facts the Subordinate Judge held that the agreement was void for want of consideration and that it could not be said to have been made on account of natural love and affection so as to come within the first exception to the section and the decision was affirmed by the District Judge. On appeal the High Court held that the agreement must be held to have been made for natural love and affection and that A. was entitled to a decree. The Court said: "The District Judge dismissed it (the suit), holding the document void for want of consideration. . . The Subordinate Judge had held the same. He said 'there was no consideration for the agreement. The defendant voluntarily agreed to give half of the plaintiff's property to the plaintiff to secure reconciliation with the plaintiff.' It seems to us, however, that this is just the case to which s. 25 (1) of the Contract Act should be held to apply. The defendant had such natural love and affection for his brother that in order to be reconciled to him, he was willing to give him this property." As natural love and affection cannot be inferred as a fact merely because no other motive for the promise is shown, it would

(c) It would, of course, have been different if the facts had disclosed such a state of circumstances as would, under the Hindu law, have justified the wife in obtaining a separate residence and maintenance, such as violence on the part of the husband which would render it unsafe for the wife to continue to

live with him, or such continued ill-usage as would be termed cruelty in the English Court. There would then have been ample consideration to support the agreement.

(d) *Rajlukhy Dabee v. Bhootnath* (1900) 4 C. W. N. 488.

(e) (1899) 1 Bom. L. R. 495.

8. 25. seem that the Court presumed it from the relation of the parties. One would have thought that the presumption, if any, was rebutted by the plaintiff's own admissions. A desire for a reconciliation prompted (as the learned Judge of the High Court thought) by love and affection for the plaintiff is not strongly evinced by the subsequent conduct of the defendant in declining to perform the contract and driving the plaintiff to a suit. But, however this may be, it appears to us anything but safe to hold that a promise by one brother to another, unsupported by any consideration, and made solely with a view to purchase peace, can be enforced in a Court of law on the bare supposition that the object was reconciliation, and that the reconciliation was prompted by natural love and affection.

Compensation for voluntary services.—The second subsection considerably extends the real or supposed exceptions (for their authority is by no means clear) allowed in the Common Law to the principle that past consideration is no consideration at all, since the consideration and the promise have to be simultaneous (*f*). The language of the Act is quite clear, and must be taken as expressing a deliberate policy; it would therefore be useless to discuss the English rules.

The act voluntarily done must have been done for the promisor (*g*). If it is done for any other person, the promise does not come within the provisions of this clause. In an Allahabad case the defendants by a written agreement promised to pay to the plaintiff a commission on articles sold by them in a market established by the plaintiff at his expense. The market was not established at the desire of the defendants, nor was it erected for them, but this was done at the request of the Collector of the place. The only ground for making the promise was the expense incurred by the plaintiff in establishing the *ganj*. The Court held that the promise could not be supported under the present sub-section (*h*). Further, the act

(*f*) As to the English law see Anson, 14th ed. 121 sqq., and *cp.* p. 164-5 above.

(*g*) Not at his request. That case is covered by s. 2 (*d*), p. 13 above. The enactment now before us "appears to cover cases where a person without the knowledge of the promisor, or otherwise

than at his request does the latter some service, and the promisor undertakes to recompense him for it": per Farran, C.J., *Sindha v. Abraham* (1895) 20 Bom. 755.

(*h*) *Durga Prasad v. Baldeo* (1880) 3 All. 221.

voluntarily done must have been done for a promisor who was in existence at the time when the act was done. Hence work done by a promoter of a company before its formation cannot be said to have been done for the company (i). Again, the act done must have been done for a promisor who is competent to contract at the time when the act was done. Hence a promise by a person on attaining majority to repay money lent and advanced to him during his minority does not come within the exception, the promisor not being competent to contract when the loan was made to him. It has been so held by the High Court of Madras (j). A different view has been taken by the High Court of Calcutta (k), and by the Chief Court of the Punjab (l), but it does not appear to be sound law. See notes to s. 11 under the head "Minor's Contract," on p. 68 above. A promise to pay a woman an allowance for past cohabitation has been regarded as an undertaking by the promisor to compensate the promisee for past services voluntarily rendered to him (m); but the correctness of these decisions may be doubted. It is true that in English law past cohabitation, though no better in law than any other past consideration, is not an unlawful consideration (n) so as to make a formal instrument void which is in fact given to secure an allowance therefor. But in order to support the Indian decisions just cited it must be held that cohabitation is at the time such a lawful voluntary service as to be a proper subject for compensation, which is quite another matter (o).

(i) *Ahmedabad Jubilee S. & W. Co. v. Chhotalal* (1908) 10 Bom. L. R. 141, 143. So it is well settled in England that a company cannot ratify acts of its promoters done before it was formed.

(j) *Indran Ramaswami v. Anthappa Chettiar* (1906) 16 Mad. L. J. 422.

(k) *Musammal Kundan Bibi v. Sree Narayan* (1907) 11 C. W. N. 135.

(l) *Karm Chand v. Basant Kuar* (1911) *Punj. Rec.* no 31.

(m) *Dhiraj Kuar v. Bikramajit Singh* (1881) 3 All. 787; *Man Kuar v. Jasodha Kuar* (1877) 1 All. 478, *Lakshminarayana v. Subhadri Ammal* (1903) 13 Mad.

L. J. 7, 13.

(n) *Grey v. Mathias* (1800) 5 R. R. 48; 5 Ves. 286; *Beaumont v. Reeve* (1846) 8 Q. B. 483. It may perhaps be doubted whether the effect given to the present sub-section by applying these authorities to it was contemplated by the framers of the Act.

(o) See on s. 23, pp. 164-5 above. At all events adulterous intercourse will not support a subsequent promise of compensation under this clause: *Alice Mary Hill v. William Clarke* (1905) 27 All. 266.

8. 25. It is clear that a case cannot come within this exception unless there is a promise in the first instance. A clause in a memorandum or articles of association of a company providing for payment to a promoter of the company does not constitute a promise by the company to the promoter. Hence a claim against a company for remuneration by a promoter of the company cannot be supported under this section, where such claim is based merely on the provisions of the memorandum and articles of association of the company (p).

Promise to pay a barred debt.—Sub-s. (3) reproduces modern English law. The reason for upholding these promises was thus stated soon after the Act came into force by Westropp, C.J. (q): “The general rule of law, no doubt, is that a consideration merely moral is not a valuable consideration such as would support a promise (r); but there are some instances of promise which it was formerly usual to refer to the now exploded principle of previous moral obligation, and which are still held to be binding, although that principle has been rejected. Amongst those instances is a promise after full age to pay a debt contracted during infancy, and a promise (in writing) in renewal of a debt barred by the Statute of Limitations. The efficacy of such promises is now referred to the principle that a person may renounce the benefit of a law made for his own protection.” To create a “promise” within the meaning of this enactment it is not necessary that there should be an accepted proposal reduced to writing. All that is necessary is that there should be a written proposal by the promisor accepted before action, for a written proposal becomes a promise when accepted (s).

The distinction between an acknowledgment under s. 19 of the Limitation Act and a “promise” within the meaning of this section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorised in that behalf; and both have the effect of creating a fresh starting

(p) *Ahmedabad Jubilee S. & W. Co. v. Chhotval* (1908) 10 Bom. L. R. 141; (q) *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Beaumont v. Reeve*, 8 Q. B. 483.
Eley v. Positive Government Security Life Insurance Co. (1876) 1 Ex. D. 88. (s) *Appa Rao v. Suryaprasada Rao* (1899) 23 Mad. 94, 97, 98.
 (q) *Tillakchand v. Jikamal* (1873) 10

point of limitation (*t*). But while an acknowledgment under the Limitation Act is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of a fresh promise will provide a fresh period of limitation (*u*). The question occasionally arises whether a writing relating to a barred debt amounts to an acknowledgment or to a promise. Here the Court must consider the language of the particular document before it in every case (*v*). If it amounts to an acknowledgment, the writing could not avail the plaintiff under this section; but it is otherwise where it amounts to a promise. Thus *khata* or an account stated has been held to be a mere acknowledgment as distinguished from a promise under this section (*w*). Similarly a bare statement of an account is not a promise within the meaning of this section (*x*). In the same way the words *baki deva* (balance due) at the foot of a Gujarati account were held not to amount to a promise (*y*). On the other hand, where a tenant wrote to his landlord in respect of rent barred by limitation, "I shall send by the end of *Veyshak* month," it was held that the words constituted a promise under this section (*z*). In a recent Bombay case, a *khata* signed by the defendant ran as follows: "Rs. 200 were found due on the account of the previous *khata* having been made up. For the same this *khata* is passed. The moneys are payable

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(*t*) An acknowledgment in writing is not the only mode of creating a fresh starting point of limitation in the case of a debt not barred by limitation. An oral agreement to extend the time of payment may effect the same purpose; *Shrinivas v. Raghunath* (1902) 4 Bom. L. R. 50.

(*u*) See *Ganga Prasad v. Ram Dayal* (1901) 23 All. 502, at p. 504.

(*v*) *Gobind Das v. Sarju Das* (1908) 30 All. 268. The terms of the document there considered are not clearly stated, but apparently there were no words of promise.

(*w*) *Chowksi Himatlal v. Chowksi Achrutlal* (1883) 8 Bom. 194; *Jethibai*

v. Pullibai (1912) 14 Bom. L. R. 1020.

(*x*) *Ramji v. Dharma* (1882) 6 Bom. 683; *Debi Prasad v. Ram Ghulam* (1914) 19 Cal. L. J., 263.

(*y*) *Ranchhoddas Nathubhai v. Jeychand Khushalchand* (1884) 8 Bom. 405; *Gobind Das v. Sarju Das* (1908) 30 All. 268; *Ramaswami v. Kuppuswami* (1910) 20 Mad. L. J. 656.

(*z*) *Appa Rao v. Suryaprakasa Rao* (1899) 23 Mad. 94. See also *Raghoji v. Abdul Karim* (1877) 1 Bom. 590; *Chatur Jagai v. Tulsi* (1877) 2 Bom. 230; *Laxumibai v. Ganesh Raghunath* (1900) 25 Bom. 373; *Daula v. Gonda* (1903) Funj. Rec. no. 35, the last two being cases under the Indian Stamp Act II of 1899.

8. 25. by me. I am to *pay* the same, whenever you may make a demand.” It was held that the *khata* was a promise to pay within the meaning of this section (a). “A promise to pay may be absolute or conditional. If it is absolute, if there is no ‘but’ or ‘if,’ it will support a suit without anything else: if it is conditional, the condition must be performed before a suit upon it can be decreed” (b). Thus in *Watson v. Yates* (c) the defendant, after his debt had become barred by limitation wrote as follows to his creditor in reply to a demand for payment: “I would assure you that I bear the matter in mind, and will do my utmost to repay the money as soon as I possibly can.” It was held that this constituted a conditional promise to pay the barred debt, the condition being the ability of the defendant to pay. The plaintiff in the case failed to show that the defendant was able to pay, and it was held that the defendant could not, therefore, be held bound. Similarly, if the promise be to pay a barred debt “within a month,” the promisee must wait for a month before he can sue on the promise (d). If the debtor promises to pay a barred debt out of his share of the profits of the business started by him in partnership with his creditor, the latter cannot recover the debt except in the manner provided in the agreement (e).

Agent generally or specially authorised in that behalf.—A Collector, as agent to the Court of Wards, is not an agent within the meaning of this section to bind a ward of the Court of Wards by a promise to pay a barred debt (f).

Debt.—The expression “debt” here means an ascertained sum of money. A promise, therefore, to pay the amount that may be found due by an arbitrator on taking accounts between the parties is

(a) *Chandrasasad v. Varajlal* (1906) 8 Bom. L. R. 644; *Mahbub Jan v. Nur-ud-Din* (1905) Punj. Rec. no. 102; *Bhagwan Singh v. Munshi Ram* (1917) Punj. Rec. no. 66, p. 248.

(b) *Bindae Dasia v. Chota* (1912) 16 Cal. W. N. 638, at p. 638; *Maniram v. Seth Rupchand* (1906) 33 I. A. 165, 172, 33 Cal. 1047, 1058; *Balla-pragada v. Thammana* (1917) 40 Mad. 701.

(c) (1887) 11 Bom. 580. See the

similar English authorities collected in Leake on Contracts, 6th ed. 724, or the editorial note to *Tanner v. Smart* (1827) 30 R. R. 461; 6 B. & C. 603.

(d) See *Muhammad Abdulla v. Bank Instalment Co., Ltd.* (1909) 32 All. 495—497.

(e) *Bindae Dasia v. Chota* (1912) 16 Cal. W. N. 638.

(f) *Suryanarayana v. Narendra Tharaz* (1895) 19 Mad. 255.

not a promise to pay a "debt" within this section (g). The expression "debt" in this clause includes a judgment debt. A promise, therefore, to pay the amount of a decree barred by limitation does not require any consideration to support it (h). S. 25

It is not necessary to the operation of this clause that the promise should in terms refer to the barred debt. Thus where A. passed a promissory note for Rs. 325 to B., and, after the debt was time-barred, passed another note promising "to pay Rs. 325 for value received in cash," it was held that it was open to B. to show that the amount, though not paid in cash, referred to the debt due under the first note (i).

An insolvent who has obtained his final discharge is under no legal obligation to pay any debt included therein, and any promise to pay it is accordingly without consideration. Such a debt is said to be barred by insolvency, and the Contract Act contains no exception in favour of a promise to pay it (j). It is not clear, however, whether the same principle would apply to a promise without new consideration to pay a debt in respect of which the insolvent has obtained only his personal, and not his final, discharge, and which is included in the judgment entered up against him in favour of the official assignee. In such a case it will be observed that the creditor's remedy is not, strictly speaking, barred, but is transferred to the official assignee, who alone can recover the debt in the manner and subject to the conditions provided by the Insolvent Debtors Act of 1848. In *Naoroji v. Kazi Sidick* (k) the defendant filed his petition and schedule in the Insolvent Debtors' Court, and subsequently obtained his personal discharge. On the same day judgment was entered up against him in the name of the official assignee for the full amount of debts stated in the schedule. After this was done the plaintiff, who was a scheduled creditor for Rs. 5,000, entered into an agreement with the insolvent whereby, in satisfaction of his claim for Rs. 5,000, he agreed to accept from the insolvent a present cash payment of Rs. 800, and either the execution

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| (g) <i>Doraisami v. Vaithilinga</i> (1917) | Bom. 390. |
| 40 Mad. 31 [F. B.]. | (i) <i>Ganapathy v. Munisaumi</i> (1909) |
| (h) <i>Heera Lall v. Dhunput Singh</i> | 33 Mad. 159. |
| (1878) 4 Cal. 500; <i>Billings v. The Un-</i> | (j) <i>Per Cur. in Naoroji v. Kazi Sidick</i> |
| <i>covenanted Service Bank</i> (1881) 3 All. | (1898) 20 Bom. 636, 642, 643. |
| 781; <i>Shripatray v. Govind</i> (1890) 14 | (k) See last note. |

25. of a conveyance to him of a certain property or the payment of a further sum of Rs. 1,600 in cash (see s. 63, p. 277 *post*). The creditor sued the insolvent on the agreement, and one of the defences was that there was no consideration. It was held that the defendant's promise was not without consideration, for the plaintiff by the agreement impliedly gave up his right to share in any future rateable distribution under s. 86 of the Insolvent Debtors Act, and also the right accessory thereto, namely, of opposing the final discharge of the insolvent. The agreement, however, was held to be void as being against public policy within the provisions of s. 23 (1).

Explanation 1 needs no comment. It may be taken as a statement made by way of abundant caution.

Explanation 2 declares familiar principles of English law and equity. First, the Court leaves parties to make their own bargains; it will not set up its own standard of exchangeable values. There must be some consideration which the law can regard as valuable; but the fact that a promise is given for a certain consideration, great or small, shows that the promisor thought the consideration worth having at the price of his promise. Hobbes, though not a lawyer and having no love for the Common law, correctly expressed its doctrine when he said in his "Leviathan": "The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give." One or two English examples will suffice. Parting with the possession of goods, even for a very short time, and though it does not appear what advantage the promisor was to have from it, is consideration enough for a promise to return them in the same condition (n). An agreement to continue, though not for any defined time, an existing service, determinable at will, is a sufficient consideration (n). If the owner of a newspaper offers the financial editor's advice to readers who will send their queries to a given address, the trouble of sending an inquiry is a sufficient consideration for an undertaking that reasonable care shall be used to give sound advice in answer thereto. It would seem that a contract is concluded as soon as

(1) See pp. 142, 165, above.

(n) *Gravelly v. Barnard* (1874) L. R.

(m) *Bainbridge v. Firmstone* (1838) 8 18 Eq. 518.

A. & E. 743; 53 R. R. 234.

the reader has sent in his inquiry, the general offer being not merely an invitation, but the proposal of a contract (see p. 55 *sqq.* above); though it would also seem that only nominal damages would be recoverable if the editor did not answer at all (o).

Secondly, the fact that a consideration is grossly inadequate may nevertheless be material as evidence of coercion, fraud, or undue influence. The leading modern dictum on this subject will immediately be given as cited in an Indian case by the Judicial Committee. It must be remembered that inadequacy of consideration may be evidence that the promisor's consent was not free, but is no more; it is not of itself conclusive. Standing alone, inadequacy, as such, is not a bar even to specific performance (p).

In a suit (q) to set aside a conveyance on the ground of inadequacy of consideration the Judicial Committee observed: "The question then reduces itself to whether there was such an inadequacy of price as to be a sufficient ground of itself to set aside the deed. And upon that subject it may be as well to read a passage from the case of *Tennent v. Tennents* (L. R. 2 Sc. & D. 6) in which Lord Westbury very shortly and clearly stated the law upon this subject. He says:—'The transaction having clearly been a real one, it is impugned by the appellant on the ground that he parted with valuable property for a most inadequate consideration. My Lords, it is true that there is an equity which may be founded upon gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition.' Their Lordships are unable to come to the conclusion that the evidence of inadequacy of price is such as to lead them to the conclusion that the plaintiff did not know what he was about or was the victim of some imposition."

In a case (r) decided by the Bombay High Court before the enactment of the Contract Act, a mortgage was executed by ignorant and illiterate peasants who were seeking to raise moneys for tilling their

(o) *De la Bere v. Pearson, Ltd.* [1908] Contract, 8th ed. 681.

1 K. B. 280, C. A.

(q) *The Administrator-General of Bengal v. Juggeswar Roy* (1877) 3 Cal. 192, 196.

(p) Specific Relief Act, s. 28 (a), see below. And so it is now well understood in England, notwithstanding former conflicting opinions, see Pollock,

(r) *Kedari Bin Ranu v. Almarambhat* (1866) 3 B. H. C. A. C. 11.

25, 26. lands, in favour of the plaintiffs, who were money-lenders by profession. The mortgage included, amongst other unusual provisions a covenant to sell the property to the mortgagees at a gross undervalue in certain events. In setting aside the mortgage as fraudulent and oppressive, Westropp, C. J., said: "Mere inadequacy of consideration, it is true, unless it be so great as to amount to evidence of fraud, is not sufficient ground for setting aside a contract, or refusing to decree a specific performance of it. Inadequacy of consideration, when found in conjunction with any other such circumstance as suppression of the value of property, mis-representation, fraud, surprise, oppression, urgent necessity for money, weakness of understanding, or even ignorance, is an ingredient which weighs powerfully with a Court of Equity in considering whether it should set aside contracts, or refuse to decree specific performance of them" (s).

26.—Every agreement in restraint of the marriage of any person, other than a minor, is void.

Agreement in restraint of marriage void.

The wide and unguarded language of this section is taken from the draft Civil Code of New York (s. 836). There is very little positive authority in England, but it seems probable that a contract limited to not marrying a certain person or any one of a certain definite class of persons would be held good (t). Apparently such agreements must be held void in British India.

Again, an agreement by a Hindu at the time of his marriage with his first wife not to marry a second wife while the first was living would be void according to the literal terms of this section. It may be doubted whether such a result was ever contemplated by the Legislature. The Hindu law recognizes polygamy, and as to Mahomedan Law a man may have as many as four wives at a time. But neither law binds a man to marry more than one wife. It would seem, therefore, that a provision in a Kabinnamah by which a Mahomedan husband authorises his wife to divorce herself from him in the event of his marrying a second wife is not void, and if the wife

(s) 3 B. H. C. A. C. at pp. 18, 19. effect *Bhimbhat v. Yeshwantrao* (1900) 25 Bom. 126.
Compare s. 53 of the Transfer of Property Act and ss. 25 and 28 (a) of the Specific Relief Act. See to the same (t) Pollock, 8th ed. 368—368.

divorces herself from the husband on his marrying a second wife, the divorce is valid, and she is entitled to maintenance from him for the period of *iddat* (u), see s. 23, pp. 159, 160 ante. Ss. 26,

27.—Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Agreement in restraint of trade void.

Saving of agreement not to carry on business of which good will is sold.

Exception 1.—One who sells the good will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good will from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business.

Exception 2.—Partners may, upon or in anticipation of a dissolution of the partnership, agree that some or all of them will not carry on a business similar to that of the partnership within such local limits as are referred to in the last preceding exception.

Exception 3.—Partners may agree that some one or all of them will not carry on any business, other than that of the partnership, during the continuance of the partnership.

Agreements in Restraint of Trade.—This section, like the last, unfortunately follows the New York draft Code, which has been the evil genius of this Act. The first paragraph is taken almost word for word from s. 833 of that production. The original draft of the Indian Law Commission did not contain any specific provision on the subject.

The New York draftsmen were of opinion that “contracts in restraint of trade have been allowed by modern decisions to a very dangerous extent,” and, deliberately tried to narrow the common law.

(u) *Maharam Ali v. Ayasa Khaitun* (1915) 19 C. W. N. 1228.

8, 27. Meanwhile the common law has, on the contrary, been widening; the old fixed rules as to limits of space have been broken down, and the Court has only to consider in every case of a restrictive agreement whether the restriction is "reasonable . . . in reference to the interests of the parties concerned and reasonable in reference to the interests of the public." In determining this the nature and extent of the business to be protected are material elements (v). The extension of modern commerce and means of communication has displaced the old doctrine that the operation of agreements of this kind must be confined within a definite neighbourhood. But the Anglo-Indian law has stereotyped that doctrine in a narrower form than even the old authorities would justify. The first and second exceptions are also taken with slight variations from the New York draft Code.

The section is general in its terms, and declares all agreements in restraint of trade void (w) *pro tanto*, except in three cases specified in the exceptions. The object appears to have been to protect trade. It has been said that "trade in India is in its infancy; and the Legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained" (x). That reason, however, cannot have been supposed applicable in New York even sixty years ago. It looks as if the New York clause had been simply copied without reflection by the draftsman of the Indian legislative department.

To escape the prohibition, it is not enough to show that the restraint created by an agreement is partial, and not general; it must be distinctly brought within one of the exceptions. "The words 'restrained from exercising a lawful profession, trade or business' do not mean an absolute restriction, and are intended to apply to a partial restriction, a restriction limited to some particular place, otherwise the first exception would have been unnecessary." Moreover, "in the following section (s. 28) the legislative authority when it intends to speak of an absolute restraint,

(v) *Nordenfelt v. Mazim-Nordenfelt* *bhai Maneklal v. Sharafali Isabji* (1897)
Co. [1894] A. C. 535, 565 (Lord Mac- 22 Bom. 861, 866.
naghten). (x) Per Kindersley, J., in *Oakes & Co.*

(w) Certainly not "illegal": *Hari- v. Jackson* (1876) 1 Mad. 134, 145.

and not a partial one, has introduced the word 'absolutely.' . . . S. 27.

The use of this word in s. 28 supports the view that in s. 27 it was intended to prevent not merely a total restraint from carrying on trade or business, but a partial one. We have nothing to do with the policy of such a law. All we have to do is to take the words of the Contract Act, and put upon them the meaning which they appear plainly to bear" (y). This view of the section was expressed by Couch, C.J., in *Madhub Chunder v. Rajcoomar Doss* (z). The parties in that case carried on business as braziers in a certain locality in Calcutta. The plaintiff's mode of business was found by the defendants to be detrimental to their interests, and an arrangement was thereupon entered into between the parties whereby the plaintiff agreed to stop his business in that locality, and the defendants promised in consideration of his doing so to pay to the plaintiff all sums which he had then disbursed as advances to workmen. Pursuant to the agreement, the plaintiff ceased carrying on business in that locality, and the defendants having failed to perform their part of the contract, he sued them to recover Rs. 900, being the amount advanced by him to the workmen. It was held that the agreement was void under this section, though the restriction put on the plaintiff's business was limited to a particular place only, and that the plaintiff was not, therefore, entitled to any damages. "If the agreement on the part of the plaintiff is void, there is no consideration for the agreement on the part of the defendants to pay the money; and the whole contract must be treated as one which cannot be enforced" (a). Similarly a stipulation in a contract prohibiting the defendant from engaging in the cultivation of tea for a period of five years from the date of the termination of his agreement with the plaintiffs was held void, although the restriction only extended to a distance of forty miles from the plaintiff's tea gardens (b). And where by the terms of a contract the plaintiff agreed with the defendant not to carry on the business of a dubash for a period of three years, and to act as a stevedore only of five ships to be given to him by the defendant, and not to do any

(y) The generality of the section, as thus explained, appears to have been overlooked in framing illustration (e) to s. 57 of the Specific Relief Act.

(z) (1874) 14 B. L. R. 76, 85, 86.

(a) *Ib.* at p. 86.

(b) *The Brahmaputra Tea Co., Ltd. v. Scarth* (1885) 11 Cal. 545, 549.

- S. 27. services to ships belonging to any body else for the like period, it was held that the agreement was void, as the first branch imposed an absolute, and the second a partial, restraint on the plaintiff's business (c). In an earlier Madras case a covenant whereby the defendants agreed with the plaintiffs, at the time of entering into their service at Madras, not to carry on the same business (that of dress-makers and milliners) on the expiry of the period of service within 800 miles from Madras, was held void, as being in restraint of trade (d). And it was said the decision would be the same even if the validity of the contract depended on the English law, as the limit of 800 miles would be unreasonable having regard to the nature of the business (e).

Restraint during term of service.—An agreement of service by which an employee binds himself, during the term of his agreement, not to compete with his employer directly or indirectly is not in restraint of trade. If it were otherwise, "all agreements for personal service for a fixed period would be void. An agreement to serve exclusively for a week, a day, or even for an hour, necessarily prevents the person so agreeing to serve from exercising his calling during that period for any one else than the person with whom he so agrees. It can hardly be contended that such an agreement is void. In truth, a man who agrees to exercise his calling for a particular wage and for a certain period agrees to exercise his calling and such an agreement does not restrain him from doing so. To hold otherwise would, I think, be a contradiction in terms." Such an agreement may be enforced by injunction where it contains a negative clause, express or implied (f), providing that the employee should not carry on business on his own account during the term of his engagement (g). Thus in *Charlesworth v. MacDonald* (h) the defendant agreed to serve the plaintiff, a physician and surgeon practising at Zanzibar, as an assistant for three years. The letter which stated the terms which the plaintiff

(c) *Nur Ali Dubash v. Abdul Ali* (1892) 19 Cal. 765.

(d) *Oakes & Co. v. Jackson* (1876) 1 Mad. 134.

(e) *Ib.* at p. 145.

(f) See Specific Relief Act, 1877, s. 57, ill. (d) below, *Subba Naidu v. Haji Badsha* (1902) 26 Mad. 168, 172; *Pragji v. Pranjivan* (1903) 5 Bom. L. R. 878.

(g) Note that wrongful dismissal of the employee, being an entire repudiation of the contract, puts an end to an ancillary agreement of this kind no less than to the service itself: *General Billposting Co. v. Atkinson* [1909] A. C. 118.
(h) (1898) 23 Bom. 103. See also *The Brahmaputra Tea Co. Ltd. v. Scarth* (1885) 11 Cal. 545, 550.

offered and the defendant accepted contained the words "The ordinary clause against practising must be drawn up." No formal agreement was drawn up, and at the end of a year the defendant ceased to act as the plaintiff's assistant and began to practise in Zanzibar on his own account. It was held that the plaintiff was entitled to an injunction restraining the defendant from practising in Zanzibar on his own account during the period of the agreement (i).

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Public policy.—In two recent cases it was suggested that, even if the section did not apply to cases of partial restraint, they might come under ss. 23, 24, of the Act. In *Haribhai v. Sharafali* (j) Candy, J., said: "I would not extend the meaning of s. 27 beyond what the words primarily mean. There may be contracts which do not come within the terms of that section and its exceptions, and yet may be contracts 'in partial restraint of trade,' and as such contrary to public policy and so void (ss. 23, 24, Contract Act). That is the common law doctrine by which restraints of trade, even though partial, are presumed to be bad (k), the presumption being rebuttable. It is for the Court to determine whether the contract be a fair and reasonable one or not, and the test appears to be whether it be prejudicial or not to the public interest, for it is on grounds of public policy alone that these contracts are supported or avoided." And in *Nur Ali Dubash v. Abdul Ali* (l) the Court (consisting of Pigot and Macpherson, J.J.) said: "It is not necessary to consider the effect of s. 24 of the Contract Act upon the case, whether, even had the stipulation in partial restraint of trades not been illegal, the defendant's agreement would not nevertheless have been void, part of the consideration for it having been the undertaking by the plaintiff absolutely to refrain from carrying on the business of dubash. Probably that would be the proper construction

(i) Note that the Specific Relief Act is not law in Zanzibar. The Bombay Court based its decision on the authority of *Lumley v. Wagner* (1852) 1 D. M. G. 604, 91 R. R. 193; a rule which is now considered anomalous and will not be extended: see *Whitwood Chemical Co. v. Hardman* [1891] 2 Ch. 416, and *Ehrman v. Bartholomew* [1898] 1 Ch. 671. These later authorities cannot, of course, affect the application of the Specific Relief Act

where it is in force. See s. 57 of that Act and notes thereon below.

(j) (1897) 22 Bom. 861, 873.

(k) This mode of stating the law is erroneous. See per Lindley, L.J., in *Mills v. Dunham* [1891] 1 Ch. 576, 587, a case which apparently was not before the learned Judge: "You are to construe the contract, and then see whether it is legal."

(l) (1892) 19 Cal. 765, 774.

- S. 27. of the contract." In a Madras case (*m*) an agreement whereby certain Hindu workers in lead bound themselves not to carry on their business with the assistance of any persons not belonging to their caste was held to be void. The decision was put on the ground that it would be against public policy to give effect to the agreement, as it might cause very serious restraint upon trade operations. There was no reference either in the judgment or argument of counsel to the present section. If there had been, the question might have been considered whether the words "any one" are limited to a party to the agreement, though in this case the parties already purported to restrain themselves to the extent of not employing persons not belonging to their caste, however difficult it might be to carry on the business otherwise.

These suggestions, however, do not seem sound. The present section is very strong; it invalidates many agreements which are allowed by the Common Law; and it does not seem open to the Courts to hold that any agreement *in pari materia*, not coming within the terms of the section, is void on some unspecified grounds of public policy. "So far as restraint of trade is an infringement of public policy, its limits are defined by section 27" (*n*).

Agreements not in restraint of trade.—This section aims at "contracts by which a person precludes himself altogether either for a limited time or over a limited area from exercising his profession, trade, or business, not contracts by which in the exercise of his profession, trade, or business, he enters into ordinary agreements with persons dealing with him which are really necessary for the carrying on of his business" (*o*). In one sense every agreement for sale of goods whether *in esse* or *in posse* is a contract in restraint of trade, for if A. B. agrees to sell goods to C. D. he precludes himself from selling to anybody else. But a reasonable construction must be put upon the section, and not one which would render void the most common form of mercantile contracts (*p*). Thus a stipulation in an agreement whereby the plaintiffs agreed that they would not sell to others for a certain period any goods of the same description they were selling to the defendant is not

(*m*) *Vaithelunga v. Saminada* (1878) 2 (1905) 29 Bom. 107, at p. 120.
 Mad. 44. (o) Per Handley, J., in *Mackenzie v. Striramiah* (1890) 13 Mad. 472, 475.
 (n) Per Jenkins, C.J., in *Fraser & Co. v. The Bombay Ice Manufacturing Co.* (p) 13 Mad. at p. 474.

in restraint of trade (*q*). Similarly an agreement to sell all the salt manufactured by the defendant during a certain period to the plaintiff at a certain price is not in restraint of trade (*r*). It is otherwise if the agreement, while binding the manufacturers not to sell their goods to any other person than the other contracting party, does not bind the other party to buy all the produce or any definite quantity. In such a case the agreement is bad as being in restraint of trade. Where twenty-nine out of thirty manufacturers of combs in the city of Patna agreed with R. S. to supply him with combs and not to sell combs to any one else, with an option to R. S. not to accept the goods manufactured if he found there was no market for them in Patna, Calcutta, or elsewhere, the agreement was held void (*s*). And where A. agreed to purchase certain goods from B. at a certain rate for the Cuttack market, and the contract contained a stipulation that, if the goods were taken to Madras, a higher rate should be paid for them, it was held that the stipulation for the higher rate was not in restraint of trade (*t*). All that the contract comes to in such a case is that the vendor is to sell the goods at one price if they are sent to Cuttack, but at another price if they are sent for sale to Madras. Where the owners of two neighbouring villages, which were let out for holding a cattle market on Tuesdays and Saturdays on payment of market fees, entered into an agreement, to prevent competition and consequent loss to them, that each should let out his village for holding the market on certain specified days, it was held that the agreement was not in restraint of "any profession, trade or business" within the meaning of this section, and it was not therefore void. The Court said: "It seems to us that a landlord who, in return for market tolls or fees, allows a cattle market to be conducted on his land is not thereby exercising the trade or business of selling cattle" (*u*).

(*q*) *Carlises, Nephews & Co. v. Ricknauth Bucktearmull* (1882) 8 Cal. 809.

(*r*) *Mackenzie v. Striramiah* (1890) 13 Mad. 472; affirmed in appeal *sub nomine Sadagopa Ramanjiah v. Mackenzie* (1891) 15 Mad. 79.

(*s*) *Shaikh Kalu v. Ram Saran Bhagat* (1909) 13 Cal. W. N. 388. It was also said that the agreement was void as

creating a monopoly. *Qu.* was there any agreement at all until R. S. actually accepted some goods? *R. v. Demers* [1900] A. C. 103, p. 44 above.

(*t*) *Prem Sook v. Dhurum Chand* (1890) 17 Cal. 320.

(*u*) *Pothi Ram v. Islam Fatima* (1915) 37 All. 212.

- S. 27.** **Trade Combinations.**—An agreement between manufacturers not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions, is not avoided by this section, and cannot be impeached as opposed to public policy under s. 23 (v). The question whether an agreement whereby manufacturers agree with one another to carry on their works under special conditions, or traders agree amongst themselves to sell their wares at a fixed price, is in restraint of trade has frequently arisen in English Courts. Such agreements have in some instances been disallowed, and in others upheld, according as the restraints were or were not deemed to be in excess of what was reasonably sufficient to protect the interests of the parties concerned. Agreements of this description do not appear to be common in India, and, so far as we are aware, there are only two Indian decisions, both of the Bombay High Court, in which the question, though raised, was not decided. In the first of these cases the owners of four ginning factories, with a view to prevent competition amongst them, entered into an agreement which provided *inter alia* that they should charge a uniform rate of Rs. 4-8 per *palla* of cotton to be ginned, and that they should treat Rs. 2-8 of that sum as the actual cost of ginning, and that the remaining Rs. 2 should be carried to a common fund which was to be divided each year between them in proportion to the number of gins which each of them possessed. The agreement was to continue in force for four years. The other parties carried out the agreement, but the defendant, though he had credited the Rs. 2 to a separate account, refused to pay the plaintiff his share of the amount. The plaintiff sued the defendant to recover his share. The defendant contended that the agreement was in restraint of trade and was therefore not enforceable. The Court held that the plaintiff was entitled to recover his share from the defendant. Farran, C.J., thought that the stipulation that the parties should not charge more than Rs. 4-8 per *palla* was in restraint of trade. Candy, J., however, was inclined to the contrary view. The decision was put on the ground that the only agreement sought to be enforced in the suit was the agreement to divide the profits, which was perfectly lawful, and that there was no question in the suit to enforce any of the

(v) *Fraser & Co. v. Bombay Ice Manufacturing Co.* (1904) 29 Bom. 107.

covenants alleged to be in restraint of trade (w). In the subsequent case of *Fraser & Co. v. The Bombay Ice Manufacturing Co.* (x) Sir Lawrence Jenkins, C.J., expressed a decided opinion that a stipulation restraining the parties to a combination agreement from selling ice manufactured by them at a rate lower than the rate fixed in the agreement was not void under this section. The learned judge said: "The scheme of the agreements was no doubt to limit competition and keep up prices; but that does not necessarily bring them within the terms of section 27: to succeed in the defence under that section, Frasers [the defendants, who had refused to abide by the agreement] must establish that the present suit is one to enforce an agreement whereby some one is restrained from exercising a lawful profession, trade, or business of any kind" (y). In that case four ice manufacturing companies in Bombay, with a view to prevent competition among them, entered into an agreement which provided *inter alia* that they should not sell ice manufactured by them for less than Rs. 58 per ton, that the cost of manufacturing ice should be taken at Rs. 17-8 per ton, and that the difference between the selling price and the cost price should be brought into a general fund for the benefit of all of them. The agreement was entered into in March, 1902, and it was to remain in force up to 31st December, 1903. In May, 1902, Messrs. Fraser and Co., one of the contracting parties, wrote to the others stating that the agreement was of no binding force, and that from 1st June next they would commence to sell ice at Rs. 22-8 per ton. Thereupon in July, 1902, the other parties brought a suit against Fraser and Co. for an injunction restraining them from selling ice to any person at any lower rate than the agreed rate, and to recover from them the amount payable by them to the general fund in pursuance of the agreement. Unlike the preceding case, therefore, the suit was to enforce the stipulation that none of the parties should sell for less than the agreed rate. Thus the question arose whether the stipulation was void under the present section, but it was not decided, as the period of the agreement expired during the pendency of the suit: the Court, however, expressed the opinion above stated, in favour of its validity. That part of the

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(w) *Haribhai Maneklal v. Sharafali Isabji* (1897) 22 Bom. 861.

(x) (1905) 29 Bom. 109.

(y) 29 Bom. pp. 118—119.

8. 27. agreement which provided for contribution to the general fund was held to be perfectly valid and enforceable. It may be rather a nice question whether agreements which do not restrain a man altogether while they last, "from exercising a lawful profession, trade, or business," but only restrain, as in the case last mentioned, the manner in which it shall be exercised, are within this section or not. There is English authority for holding such agreements to be in restraint of trade (z). But the present section certainly does not reproduce the Common Law, as we have seen. It seems therefore, that it should be construed according to its literal terms. When so construed, we submit that it only strikes at agreements which operate as a total bar to the exercise of a lawful business, for however short a period or however limited the area, and does not avoid agreements which merely restrain freedom of action in detail in the actual exercise of a lawful business. The stipulation not to gin cotton or to sell ice for less than a fixed rate is an agreement of this character. It does not restrain any party to the contract from ginning cotton or from selling ice; in other words, none of the parties is restrained from exercising his business of ginning cotton or selling ice. What it does provide for is that in the exercise of the business certain terms shall be observed. In a recent Allahabad case it was held that agreements such as the above were neither in restraint of trade nor opposed to public policy (a).

"To that extent."—The meaning of these words is that if the agreement can be broken up into parts, it will be valid in respect of those parts which are not vitiated as being in restraint of trade. Where the agreement is not so divisible, it is wholly void (b).

Lex loci contractus.—The Courts of this country will not enforce a contract made abroad, to be performed in this country, contrary to the policy of the law of this country. An agreement, therefore, in restraint of trade, made abroad and to be performed in India, is void in India, though it may be valid by the *lex loci contractus* (c).

(z) *Hilton v. Eckersley* (1856) 6 E. & B. 47; 106 R. R. 507.

(b) *Parasullah v. Chandra Kant* (1917) 21 C. W. N. 979, 983.

(a) *Kuber Nath v. Mahalik Ram* (1912) 34 All. 587.

(c) *Oakes & Co. v. Jackson* (1876) 1 Mad. 134, 144.

Exception 1.—This exception deals with a class of cases which had a leading part in causing the old rule against agreements in restraint of trade to be relaxed in England. The rule arose apparently from a popular dislike of all combinations tending to raise prices, which may be compared with the recent agitation in America against the modern system of “trusts.” It has been laid down in quite modern cases, as the governing principle, that “no power short of the general law,” not even the party’s own bargain, should be allowed to restrain a man’s discretion as to the manner in which he shall carry on his business (*d*); and originally the rule was without exceptions. “In time, however, it was found that a rule so rigid and far-reaching must seriously interfere with transactions of every-day occurrence” (*e*); and from the early part of the sixteenth century onwards restrictions “for a time certain and in a place certain,” to prevent the seller of a business from competing with the buyer, were allowed. In the nineteenth century it was settled that a limit of time was not necessary, and contracts for the preservation of trade secrets were held to be outside the rule, altogether; and finally the House of Lords has declared that there is no hard and fast rule at all. The question is always whether the restraint objected to is reasonable with reference to the particular case and not manifestly injurious to the public interest (*f*).

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The law of British India, however, is tied down by the language of this section to the principle, now exploded at home, of a hard and fast rule qualified by strictly limited exceptions; and, however mischievous the economical consequences may be, the Courts here can only administer the Act as they find it.

The kind of cases covered by this exception may be illustrated by a decision some years earlier than the Act. A covenant by the defendants on the sale of the goodwill of their business of carriers to the plaintiff not to convey passengers to and fro on the road between Ootacamund and Mettapolliem was not in restraint of trade. “So

(*d*) *Hillon v Eekersley* (1856) 6 E. & B. 47, 74; 106 R. R. 507, 522.

judgment at large for a full critical discussion of the common law.

(*e*) Lord Macnaghten in *Nordenfeld’s Case* [1894] A. C. 535, 564; see his

(*f*) *Nordenfeld v. Maxim-Nordenfeld Guns and Ammunition Co.* [1894] A. C. 535.

Sec. 27, 28. partial a restraint is not really adverse to the interests of the public at large" (v). It must, however, be noted that when there is no goodwill at all attaching to a business, as where it is newly started and hardly any customers secured, and the owner is bought off to prevent competition, the mere use of the words "sale of goodwill" in the agreement will not bring the case within this exception so as to prevent the agreement from being declared void under the operative part of the section (h).

Exceptions 2 and 3.—Agreements between partners of the kind recognised (though inadequately) by these exceptions have been allowed in England ever since there has been any settled partnership law, and are exceedingly common; indeed, some such clause is rarely absent from partnership articles.

28.—Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Agreements in restraint of legal proceedings void.

Exception 1.—This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Saving of contract to refer to arbitration dispute that may arise.

When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to

Suits barred by such contracts.

(g) *Auchterlonie v. Charles Bell* (1868)
4 M. H. C. 77.

(h) *Parasullah v. Chandra Kanta* (1917)
21 C. W. N. 979.

such contract against any other such party in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit. S. 26

[Repealed by Specific Relief Act, except in scheduled districts where that Act is not in force.]

Exception 2.—Nor shall this section render illegal any contract in writing by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Saving of contract to refer questions that have already arisen.

Agreement in restraint of legal proceedings.—“ This section applies to agreements which wholly or partially prohibit the parties from having recourse to a court of law. If, for instance, a contract were to contain a stipulation that no action should be brought upon it, that stipulation would, under the first part of s. 28, be void, because it would restrict both parties from enforcing their rights under the contract in the ordinary legal tribunals and so if a contract were to contain a double stipulation that any dispute between the parties should be settled by arbitration, and that neither party should enforce his rights under it in a court of law; that would be a valid stipulation so far as regards its first branch, viz., that all disputes between the parties should be referred to arbitration, because that of itself would not have the effect of ousting the jurisdiction of the Courts but the latter branch of the stipulation would be void because by that the jurisdiction of the Court would be necessarily excluded ” (i). Thus a contract whereby it is provided that all disputes arising between the parties should be referred to two competent London brokers, and that their decision should be final, does not come within the purview of this section (j). Nor does a contract whereby it is provided that all disputes arising between the parties “ should be referred to the arbitration of the Bengal Chamber of Commerce, whose decision shall

(i) Per Garth, C.J., in *Coringa Oil* 42; *Mulji Tejsing v. Ransai Devraj* (1909) *Co., Ltd. v. Koegler* (1876) 1 Cal. 466, 468, 34 Bom. 13.

469, in appeal from same case in 1 Cal. (j) *Coringa Oil Co., Ltd. v. Koegler* last note.

- S. 28. be accepted as final and binding on both parties to the contract.” (k). But a stipulation that parties to a reference shall not object at all to the validity of the award on any ground whatsoever before any court of law does restrict a party absolutely from enforcing his rights in ordinary tribunals, and, as such, is void. The Courts have power, in spite of such a stipulation, to set aside an award on the ground of misconduct on the part of the arbitrator. It was so held by the Madras High Court in a case (l) in which the agreement to submit to arbitration contained a restrictive stipulation of the above character. The agreement in that case was filed in Court under the provisions of s. 523 of the Code of Civil Procedure, 1882 (m), and the decision was put on the ground that the very filing of the agreement in Court gave the Court jurisdiction under the arbitration chapter to set aside the award on the ground of the arbitrator’s misconduct (n). But the decision, it is submitted, ought not to be different even if the agreement were not filed in Court. For though, in that case, the provisions of the Code would not apply, the award may be set aside in a regular suit on that ground. And the same may now be done under the provisions of the Indian Arbitration Act IX of 1899 in those places where the Act applies (o). A party to a submission has the right to have an award set aside on the ground of misconduct on the part of the arbitrator, and a stipulation whereby he binds himself to accept the award as final in all cases has the effect of restricting him absolutely from enforcing his right and is, therefore, void under the provisions of this section.

For the rest the section before us affirms the Common Law. Its provisions “appear to embody a general rule recognised in the English Courts which prohibits all agreements purporting to oust the jurisdic-

(k) *Ganges Manufacturing Co., Ltd. v. Indra Chand* (1906) 33 Cal. 1169; *Champsey v. Gill & Co.* (1905) 7 Bom. L.R. 805. In such a case the rules of the Association are imported in the contract; 33 Cal. 1169; *Chaitram v. Bridhichand* (1915) 42 Cal. 1140.

(l) *Burla Ranga Reddi v. Kalapalli Sillaya* (1883) 6 Mad. 368.

(m) See now Code of Civil Procedure, 1908, Sched. II., cl. 17.

(n) See ss. 524 and 521 of the Civil Procedure Code, now Sched. II., cls. 19 and 15.

(o) See s. 2 and 14.

tion of the Courts." (p). It does not affect the validity of compromises of doubtful rights, and this view is supported by the provisions of the Civil Procedure Code, which enable parties to a suit to go before the Court and obtain a decree in terms of a compromise (q). In a case before the Contract Act was passed, it was held by the Judicial Committee that an agreement whereby the parties to a suit bind themselves before judgment is passed in the Court of first instance to abide by the decree of that Court and forego their right of appeal is valid and binding (r). Following the principle of this decision a full Bench of the Allahabad High Court (s) held that an agreement whereby a judgment debtor engaged himself not to appeal against a decree passed against him in consideration of the judgment creditor giving him time for the satisfaction of the judgment debt is not prohibited by this section. "By the agreement not to appeal, for which the indulgence granted by the respondents was a good consideration, the appellant did not restrict himself absolutely from enforcing a right under or in respect of any contract. He forewent his right to question in appeal the decision which had been passed by an ordinary tribunal. Such an agreement is in our judgment prohibited neither by the language nor the spirit of the Contract Act, and an Appellate Court is bound by the rules of justice, equity, and good conscience to give effect to it and to refuse to allow the party bound by it to proceed with the appeal" (t). But an agreement between the parties to a suit on a contract that the suit should be decided in accordance with the result of another suit between the same parties is void under this section, as it restricts the parties absolutely from enforcing their rights by the "usual legal proceedings" (u). It is competent, however, to parties to a suit under the provisions of the Indian Oaths Act, 1873, to enter into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. If the oath is made and

S. 28.

(p) *Anant Das v. Ashburner & Co.* (1876) 1 All. 267. See also *Kistnasamy Pillay v. The Municipal Commissioners for the Town of Madras* (1868) 4 M. H. C. 120, 123.

(q) *Anant Das v. Ashburner & Co.* (1876) 1 All. 267. See also the Civil Procedure Code, 1908, Order 23, r. 3.

(r) *Munshi Amir Ali v. Maharan Inderjit Koer* (1871) 9 B. L. R. 460.

(s) *Anant Das v. Ashburner & Co.* (1876) 1 All. 267.

(t) *Ib.* at p. 269.

(u) *Raja of Venkatagiri v. Chinta Reddy* (1914) 37 Mad. 408.

8. 28. evidence is given on such oath, it is under s. 11 of that Act conclusive as to the matter stated. But if a party after entering into such agreement as aforesaid refuse to make the oath, all that the Court has to do is to record under s. 12 the refusal together with the reasons if any and the trial should proceed. It is to this extent only that agreements of this character are recognised under the Indian Oaths Act. An agreement, therefore, between A and B that if A made certain statements on a special oath, B would be bound by those statements and that if A refused to take the oath, the suit instituted by A against B should be dismissed is void, as the Oaths Act does not empower a Court to dismiss a suit for such refusal (*v*).

“Rights under or in respect of any contract”.—Note that this section applies only to cases where a party is restricted from enforcing his rights under or in respect of any *contract*. It does not apply to cases of wrongs or torts. Nor does it apply to decrees. The expression “contract” does not include rights under a decree (*w*). The Code of Civil Procedure contains express provisions as to adjustment of a decree and postponement of rights under a decree by mutual agreement of parties to a suit (see Order 21, rule 2).

Limitation of time to enforce rights under a contract.—Under the provisions of this Section, an agreement which provides that a suit should be brought for the breach of any terms of the agreement within a time shorter than the period of limitation prescribed by law is void to that extent. The effect of such an agreement is absolutely to restrict the parties from enforcing their rights after the expiration of the stipulated period, though it may be within the period of limitation. Agreements of this kind must be distinguished from those which do not limit the time within which a party may *enforce* his rights, but which provide for a *release or forfeiture* of rights if no suit is brought within the period stipulated in the agreement. The latter class of agreements are outside the scope of the present section, and they are binding between the parties. Thus a clause in a policy of fire insurance which provides that “if the claim is made and rejected, and an action

(*v*) *Moyan v. Pathukutti* (1908) 31 Mad. 1. (*w*) *Ramghulam v. Janki Rai* (1884) 7 All. 124, 131.

or suit be not commenced within three months after such rejection all benefits under this policy shall be *forfeited*," is valid, as such a clause operates as a release or forfeiture of the rights of the assured if the condition be not complied with, and a suit cannot be maintained on such a policy after the expiration of three months from the date of rejection of the plaintiff's claim (x). But this cannot be said of a clause in a policy in the following form: "No suit shall be brought against the Company in connection with the said policy later than one year after the time when the cause of action accrues." Such a clause does not operate as a release or forfeiture of the rights of the assured on non-fulfilment of the condition, but it is to limit the time within which the assured may enforce his rights under the policy, and it is therefore void under the present section. The contrary, however, was held by the High Court of Bombay, the ground of the decision being that the clause amounted in effect to an agreement between the parties that if no suit were brought within a year, then neither party should be regarded as having any rights against the other (y). This decision was adversely criticized in the case last cited (z) by Beaman, J., and Scott, C.J., it seems rightly. In a Calcutta case (a) one of the conditions of a policy of marine insurance was that no suit by the assured should be sustainable in any Court unless the suit was commenced within six months next after the loss, and that if any suit was commenced after the expiration of six months, the lapse of time should be taken as conclusive evidence against the validity of the claim. It was held that the assured could not sue on the policy after the expiration of six months. No reference was made either in the argument of counsel or in the judgment to the present section.

No provision is made in the section for agreements extending the period of limitation for enforcing rights arising under it. In a case

(x) *Baroda Spg. & Wg. Co. Ltd. v. [a case of a Life Policy]*.

(z) 38 Bom. 344, at pp. 348, 353.

Satyannarayan Marine & Fire Insurance Co. Ltd. (1914) 38 Bom. 344.

(a) *South British and Marine Insur-*

(y) *Hirabhai v. Manufacturers' Life Insurance Co.* (1912) 14 Bom. L. R. 741 516, pp. 535-536, 539-542.

8. 28. before the Judicial Committee (b) their Lordships expressed their opinion that an agreement that, in consideration of an inquiry into the merits of a disputed claim, advantage should not be taken of the Statute of Limitations in respect of the time employed in the inquiry is no bar to the plea of limitation, though an action might be brought for breach of such an agreement. There is hardly any doubt that an agreement which provides for a longer period of limitation than the law allows does not lie within the scope of this section. Such an agreement certainly does not fall within the first branch of the section. There is no restriction imposed upon the right to sue; on the contrary, it seeks to keep the right to sue subsisting even after the period of limitation. Nor is this an agreement limiting the time to enforce legal rights. It would, however, be void under s. 23 as tending to defeat the provisions of the Limitation Act, 1908 (c).

Ordinary tribunals.—A clause in a bill of lading whereby it was agreed that questions arising on the bill should be heard by the High Court of Calcutta instead of the Court at Mirzapur, which was the proper tribunal to try the questions, is void, and cannot be pleaded in bar of a suit brought in the Mirzapur Court (d).

Exception 1.—This exception “applies only to a class of contracts, where (as in the cases of *Scott v. Avery* (e) and *Tredwell v. Holman* (f)), cited by Phear, J. (g)) the parties have agreed that no action shall be brought until some question of amount has first been decided by a reference, as, for instance, the amount of damage which the assured has sustained in a marine or fire policy. Such an agreement does not exclude the jurisdiction of the Courts; it only stays the plaintiff’s hand till some particular amount of money has been first ascertained by

(b) *The East India Co. v. Odichur Paul* (1849) 5 M. I. A. 43, 70. *East India Co. v. Odichurn Paul* (last note), decided many years before the

(c) *Ballepragada v. Thammana* (1917) 40 Mad. 701. By s. 3 of that Act, subject to certain exceptions contained in the Act “every suit instituted after the period of limitation prescribed (by the Act) shall be dismissed, although limitation has not been set up as a defence.” Contract Act, proceeded on the English Statutes of Limitation.

(d) *Crawley v. Luchmee Ram* (1866) 1. Agra, 129.

(e) (1855) 5 H. L. C. 811.

(f) (1862) 1 H. & C. 72.

(g) In *Koegler v. The Coringa Oil Co. Ltd.* (1875) 1 Cal. 42, 51.

reference" (h). An agreement between a tramway company and a conductor that the manager of the company shall be the sole judge as to the right of the company to retain the whole or any part of the deposit to be made by the conductor as security for the discharge of his duties, and that his certificate in respect of the amount to be retained shall be conclusive evidence between the parties in Courts of justice, comes within this exception. Such an agreement does not oust the jurisdiction of the Courts. Its effect is merely to constitute the manager the sole arbitrator between the company and the conductor as to whether, in the event of the conductor's misconduct, the company is entitled to retain the whole or any part of the deposit. The point is very similar to those which so frequently occur in England, where an engineer or architect is constituted the arbitrator between a contractor and the person who employs him as to what should be allowed in case of dispute for extras or penalties (i). It must not be supposed that the use of such terms as "sole judge" necessarily imposes any duty of proceeding in a quasi-judicial manner.

This class of cases must be distinguished from those where the obligation of a promisor, such as the duty of paying for work to be done or goods to be supplied is made, by the terms of the contract, to depend on the consent or approval of some person, as in a builder's contract, the certificate of the architect that the work has been properly done. Here there is no question of referring to arbitration, or anything like arbitration, a dispute subsequent to the contract, but the contract itself is conditional, or, in the language of the Act, contingent (ss. 31—36, below).

Section 1, Second Clause.—This clause was repealed by the Specific Relief Act. S. 21 of that Act provides that, "save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has

(i) Per Garth, C.J., in *Coringa Oil Co., Ltd. v. Koepfer* (1876) 1 Cal. 466, 469; *Cooverji v. Bhinji* (1882) 6 Bom. 528, 530.

(i) *1440re Nath Bannerjee v. The Calcutta Tramways Co., Ltd.* (1885) 11 Cal. 232, following *London Tramways Co. v. Bailey* (1877) L. R. 3 Q. B. D. 217; *Kuppusami Naidu v. Smith & Co.* (1895) 19 Mad. 178; and see *Perry v. Liverpool Malt Co.* [1900] 1 Q. B. 339, C. A.; as to the immunity of the person appointed a quasi-arbitrator from being sued for negligence, see *Chambers v. Goldhorpe* [1901] 1 K. B. 624 C. A.

- §. 28. made such a contract, and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit." If a suit is brought in respect of any such subject, it must be shown by the defendant, before he could rely upon the section as a bar to the suit, that the agreement is still operative (j), and that the plaintiff has refused to perform it. The mere act of filing the plaint is not such a refusal (k).

Remedies for breach of agreement to refer.—There are three remedies open to a party to a reference for breach of the agreement. He may sue for damages for the breach, or he may have the agreement specifically performed in the manner provided by the Code of Civil Procedure (l), or he may plead the agreement in bar of any suit that may be brought against him in violation of the terms of the agreement, as provided by the Specific Relief Act, s. 21. But the provisions of the Code and of the Specific Relief Act have no operation wherever the Indian Arbitration Act applies (m). Both these remedies, however, are still available, but in a somewhat different form, under the provisions of the Arbitration Act.

Conventional restrictions of evidence.—An agreement purporting to prevent the ordinary evidence of payment between the parties from being received has been disregarded as being an unwarrantable interference with the jurisdiction of the Court. Where a bond contained a stipulation enabling the obligee to treat as a nullity payments not endorsed in writing on the bond, it was held that the stipulation was against good conscience and did not preclude the obligor from proving payments alleged to have been made by him by oral evidence (n). Such a stipulation "cannot be permitted to control Courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payments. There is nothing in that law which would warrant our Courts in excluding direct oral evidence of payment."

(j) *Tahal v. Bisheshwar* (1885) 8 All. v. *Bisheshwar* (1885) 8 All. 57.

57; *Sheoambar v. Deodal* (1886) 9 All. (l) See Sched. II., cl. 17, 19.

168, 172.

(m) See s. 3 of the Act.

(k) *Koonrud Chunder Dass v. Chunder*

(n) *Narayan Undir Patil v. Motilal Kant Mookerjee* (1879) 5 Cal. 498; *Tahal Ramdas* (1875) 1 Bom. 45.

29.—Agreements, the meaning of which is not certain, or capable of being made certain, are void. S. 29.

Agreements void
for uncertainty.

Illustrations.

(a) A. agrees to sell to B. "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

(b) A. agrees to sell to B. one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

(c) A., who is a dealer in cocoanut-oil only, agrees to sell to B. "one hundred tons of oil." The nature of A.'s trade affords an indication of the meaning of the words, and A. has entered into a contract for the sale of one hundred tons of cocoanut-oil.

(d) A. agrees to sell to B. "all the grain in my granary at Ramnagar." There is no uncertainty here to make agreement void.

(e) A. agrees to sell to B. "one thousand maunds of rice at a price to be fixed by C." As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

(f) A. agrees to sell to B. "my white horse for rupees five hundred or rupees one thousand." There is nothing to show which of the two prices was to be given. The agreement is void.

Ambiguous contracts.—The text and (with one addition) the illustrations of this section follow the draft of the Indian Law Commissioners with only formal variation. As the illustrations are plain, and sufficient to explain the meaning of the section, it seems useless to add others from English decisions.

S. 93 of the Evidence Act provides that when the language of a document is ambiguous or defective no evidence can be given to explain or amend the document. See also ss. 94—97 of the same Act. Neither will the Court undertake to supply defects or remove ambiguities according to its own notions of what is reasonable; for this would be not to enforce a contract made by the parties, but to make a new contract for them. The only apparent exception to this principle is that when goods are sold without naming a price, the bargain is understood to be for a reasonable price (see s. 89, p. 490, below). This was probably introduced in England on the assumption that there was an ascertainable market price, and then extended to all cases.

§. 29. S. 21 of the Specific Relief Act overlaps this section; see our Commentary thereon below.

Where the defendants, describing themselves as residents of a certain place, executed a bond and hypothecated as security for the amount "our property, with all the rights and interest" (o), it was held that the hypothecation was too indefinite to be acted upon. The mere fact that the defendants describe themselves in the bond as residents of a certain place is not enough to indicate their property in that place as the property hypothecated. If they had described themselves as the owners of certain property it would then have been reasonable to refer the indefinite expression to the description (p). And where the defendant passed a document to the Agra Savings Bank whereby he promised to pay to the manager of the bank the sum of Rs. 10 on or before a certain date "and a similar sum monthly every succeeding month," it was held that the instrument could not be regarded as a promissory note (q), as it was impossible from its language to say for what period it was to subsist and what amount was to be paid under it (r). Similarly it has been held that a stipulation in a *patta* (lease) whereby the tenant agreed to pay whatever rent the landlord might fix for any land not assessed which the tenant might take up (presumably without permission) is void for uncertainty. Under such a *patta*, the landlord might fix any rent he liked, and the tenant might be liable for an unreasonable rent beyond the value of the land (s). But where the proprietor of an indigo factory mortgaged to B. all the indigo cakes that might be manufactured by the factory from crops to be grown on lands of the factory from the date of the mortgage up to the date of payment of the mortgage debt, it was held that the terms of the mortgage were not vague, and that the mortgage was not void in law (t).

(o) The original words were *hukinat apne kul haq baqul*.

(p) *Deoji v. Pithaben* (1876) 1 All. 275.

(q) A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking signed by the maker to pay a certain sum of money only to, or to the order of, a certain per-

son, or to the bearer of the instrument. See Negotiable Instruments Act XXVI of 1881, s. 4.

(r) *Carter v. The Agra Savings Bank* (1883) 5 All. 562.

(s) *Ramasami v. Rajagopala* (1887) 11 Mad. 200.

(t) *Baldeo Parshad v. Miller* (1904) 31 Cal. 667, 676—678.

30.—Agreements by way of wager are void ; and no suit 8.

Agreements by
way of wager void.

shall be brought for recovering anything
alleged to be won on any wager, or entrusted
to any person to abide the result of any game or other
uncertain event on which any wager is made.

This section shall not be deemed to render unlawful a
subscription or contribution, or agreement to
subscribe or contribute, made or entered into
for or toward any plate, prize or sum of
money, of the value or amount of five
hundred rupees or upwards to be awarded to the winner
or winners of any horse-race.

Exception in
favour of certain
prizes for horse-
racing.

Nothing in this section shall be deemed to legalize any
transaction connected with horse-racing, to
which the provisions of section 294A of the
Indian Penal Code apply.

Section 294A of
the Indian Penal
Code not affected.

Wagering contracts.—This section represents the whole law of
wagering contracts now in force in British India, supplemented in
the Bombay Presidency by Act III of 1865. Prior to the enactment of
the Contract Act the law relating to wagers was embodied in Act
XXI of 1848 (an Act for avoiding wagers). That Act was based
principally on the English Gaming Act of 1845 (8 & 9 Viet. c. 109),
s. 18, and it was repealed by the Contract Act (see the schedule to
the Act). Before the passing of Act XXI of 1848 the law relating
to wagers in force in British India was the common law of England.
By that law an action might be maintained on a wager, if it was
not against the interest or feelings of third persons, did not lead to
indecent evidence, and was not contrary to public policy (*u*).

There is no technical objection to the validity of a wagering
contract. It is an agreement by mutual promises, each of them
conditional on the happening or not happening of an unknown event.

(u) *Ramloll Thackoorseydass v. Sooll Thackoorseydass* (1850) 5 M.L.A. 109;
junmull Dhondmull (1848) 4 M. L. A. *Rughoonauth v. Manickchand* (1858) 6
339; *Doolubdass Pettambardass v. Ram.* M. L. A. 251.

8. 30. So far as that goes, promises of this form will support each other as well as any other reciprocal promises. It would have been better if the Courts in England had refused, on broad grounds of public policy, to admit actions on wagers; but this did not occur to the Judges until such actions had become common; and, until a remedy was provided by statute, they could only find reasons of special public policy in special cases, which they did with almost ludicrous ingenuity (*v*).

What is a *wager*?—A wager has been defined as a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying [this should be “promising to pay”] to him money on the event not happening (*w*). But Sir William Anson’s definition, “a promise to give money or money’s worth upon the determination or ascertainment of an uncertain event,” is neater and more accurate. To constitute a wager “the parties must contemplate the determination of the uncertain event as the sole condition of their contract. One may thus distinguish a genuine wager from a conditional promise or a guarantee”: Anson, *Law of Contract*, 14th ed. 228. “But if one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager” (*x*). “It is of the essence of a wager that each side should stand to win or lose according to the uncertain or unascertained event in reference to which the chance or risk is taken” (*y*).

In *Alamai v. Positive Government Security Life Assurance Co., Ltd.* (2), a case of life insurance, Fulton, J., said: “What is the meaning of the phrase ‘agreements by way of wager’ in s. 30 of the Contract Act? . . . Can it be that the words mean something different in India from what the corresponding words ‘agreements by way of wagering’ mean in England? I do not see how such an argument can be maintained, or how the fact that 14 Geo. III. c. 48 is not in

(*v*) Pollock, *Contract*, 8th ed. 328; and see for the history of English legislation, Anson, 14 ed. 230 sqq.

(*w*) *Hampden v. Walsh* (1876) 1 Q. B. D. 189, 192. See also per Lord Brampton in *Carlill v. Carbolic Smoke Ball Co.* [1892] 2 Q. B. 484, 490, and Anson, 14th ed. 229

(*x*) Per Birdwood, J., in *Dayabhai Tribhovandas v. Lakhmichand Panachand* (1885) 9 Bom. 358, 363 (after citing the passage from Sir W. Anson as it stood in an earlier edition).

(*y*) Per Jenkins, C.J., in *Sassoon v. Toketsey* (1904) 28 Bom. 616, p. 621.

(2) (1898) 23 Bom. 191.

force in India affects the question. In *Hampden v. Walsh* (a), Cockburn, C.J., defined a wager as a contract by A. to pay money to B. on the happening of a given event in consideration of B. paying money to him on the event not happening, and said that since the passing of 8 & 9 Vict. c. 109 there is no longer as regards action any distinction between one class of wager and another, all wagers being made null and void at law by the statute. In *Thacker v. Hardy* (b), Cotton, L.J., said that the essence of gaming and wagering was that one party was to win and the other was to lose upon a future event, which at the time of the contract was of an uncertain nature; but he also pointed out that there were some transactions in which the parties might lose and gain according to the happening of a future event which did not fall within the phrase. Such transactions, of course, are common enough, including the majority of forward purchases and sales (c).

"A certain class of agreements such as bets, by common consent, come within the expression 'agreements by way of wagers.' Others such as legitimate forms of life insurance, do not, though, looked at from one point of view, they appear to come within the definition of wagers. The distinction is doubtless rather subtle, and probably lies more in the intention of the parties than in the form of the contract (d). In such doubtful cases it seems to me that the only safe course for the Courts in India is to follow the English decisions, and that when a certain class of agreement has indisputably been created as a wagering agreement in England it ought to receive the same treatment in India" (e).

"By Way of Wager".—There is no distinction between the expression "gaming and wagering," used in the English Act and the Act of 1848, and the expression "by way of wager," used in this section (f).

(a) (1875) 1 Q. B. D. 189.

(b) (1878) 4 Q. B. D. 685, 695.

(c) See notes below, "Speculative transactions," p. 241.

(d) "It is the fact that the law permits the one kind of contract and does not permit the other, which makes the

distinction between the two": Anson, p. 229, 14 Ed.

(e) See *Trimble v. Hill* (1879) 5 App. Ca. 342; and *Kathama Natchiar v. Dorasingu* (1875) L. R. 2 Ind. Ap. 169, 186.

(f) *Kong Yee Lone & Co. v. Lowjee Nanjee* (1901) 29 Cal. 461; L. R. 28 Ind. Ap. 239.

8. 30. The cases (g), therefore hearing on the expression used in those Acts are still useful in construing the expression "by way of wager," used in the present section.

Wagering contracts may assume a variety of forms, and a type with which the Courts have constantly dealt is that which provides for the payment of differences (h) in stock transactions, with or without colourable provisions for the completion of purchases. Such provisions, if inserted, will not prevent the Court from examining the real nature of the agreement as a whole (i). "In order to constitute a wagering contract neither party should intend to perform the contract itself, but only to pay the differences" (j). It is not sufficient if the intention to gamble exists on the part of only one of the contracting parties. "Contracts are not wagering contracts unless it be the intention of both contracting parties at the time of entering into the contracts under no circumstances to call for or give delivery from or to each other" (k). It is not necessary that such intention should be expressed. "If the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market." This was laid down by the Judicial Committee in *Kong Yee Lone & Co. v. Loujee Nanjee* (l) on appeal from the Court of the Recorder of Rangoon. The plaintiff in that case was a rice trader; the defendants were rice millers, having a small mill capable of putting out 30,000 hags in a month. During seven weeks in June, July, and August 1899, the defendants entered into several

(g) See especially *The Universal Stock Exchange, Ltd. v. Strachan* [1896] A. C. 166, and *In re Gieve* [1899] 1 Q. B. 794, both decided under the English Act of 1845.

(h) *Doshi Talakshi v. Shah Ujamsi Valsi* (1889) 24 Bom. 227, 229.

(i) *Re Gieve* [1899] 1 Q. B. 794, C. A.

(j) *Perosha v. Manekji* (1898) 22 Bom. 899, 903; *The Universal Stock Exchange v. Strachan* [1896] A. C. 166; *Eshoor Doss v. Venkatarubba Rau* (1895) 18

Mad. 306.

(k) *J. H. Tod v. Lakhmidas* (1892) 16 Bom. 441, 445, 446; *Ajudhia Prasad v. Lalman* (1902) 25 All. 38; *Sassoon v. Tokerecy* (1904) 28 Bom. 616; *Motilal v. Govindram* (1905) 30 Bom. 83; *Hurmukhrai v. Narotamdass* (1907) 9 Bom. L. R. 125; *Kesarichand v. Merwanjee* (1899) 1 Bom. L. R. 263; *Meghji v. Jadhourji* (1910) 12 Bom. L. R. 1062.

(l) (1901) 29 Cal. 461 467; L. R. 28 Ind. Ap. 239.

contracts with the plaintiff for the sale to him of 199,000 bags of rice at various prices, aggregating upwards of five crores of rupees, and the latest delivery was to be on 7th October, 1899. The rice was to be delivered from amongst a number of specified mills, in which the defendants' mill was not included. In the same year by fourteen contracts, ranging in time from January to the end of August, the defendants sold to the plaintiff 22,250 bags of rice, to be delivered from the defendants' mill. The latter contracts were all duly fulfilled by delivery and payment. None of the former contracts were performed, and the defendants passed to the plaintiff a promissory note for "difference on rice." In a suit upon the note it was held by the Recorder of Rangoon that there was no common intention to wager and that the plaintiff was entitled to succeed. The judgment was reversed by the Judicial Committee on appeal, on the ground that the consideration for the note was a number of wagering contracts within the meaning of the present section. Their Lordships observed: "Now the output of the firm itself would not be much over 60,000 bags during the currency of the contracts; and they (defendants) had dealings with other persons besides the plaintiff. The capital of the firm as stated was a trifle more than a lac of rupees. The cost of the goods would be that amount multiplied five hundredfold. It is possible for traders to contemplate transactions so far beyond their basis of trade, but it is very unlikely. In point of fact, they never completed, nor were they called on to complete, any one of the ostensible transactions. The rational inference is that neither party ever intended completion. When the two classes of contracts are compared, the one class suitable to traders, such as the defendants, and fulfilled by them, the other extravagantly large and left without any attempt at fulfilment, the rational inference is strengthened into a moral certainty." Similarly in *Doshi Talakshi v. Shah Ujamsi Velsi* (m) certain contracts were entered into in Dholera for the sale and purchase of Broach cotton, a commodity which, it was admitted, never found its way either by production or delivery to Dholera. The contracts were made on terms contained in a printed form which incorporated the rules framed by the cotton merchants of Dholera. Those rules expressly provided for the delivery of cotton in every case, and forbade all gambling in differences. The

8. 30. course of dealings was, however, such that none of the contracts was ever completed except by payment of differences between the contract price and the market price in Bombay on the *vaida* (settlement) day. It was held upon these facts that the contracts were by way of wager within the meaning of this section. Jenkins, C.J., said: "Here in each case the contracts was made at Dholera, between men of Dholera, and under the rules of Dholera, and from the evidence we know that the witnesses who have been called have not been able to indicate with certainty or even to suggest, with one doubtful exception, a single instance since the formulation of those rules in 1892 in which any one of the numerous contracts similar to that with which we are now dealing has been completed otherwise than by payment of differences. Is it an unnatural or strained inference to draw from these facts that behind these apparently innocent documents there is a tacit and recognised understanding according to which parties who enter into these contracts do so without any intention of performing them otherwise than they have consistently and without exception been performed, that is to say, by payment of differences? In my opinion that is the reasonable and natural inference to be drawn; it agrees with the experience of the past; and it represents the actual results in the particular instances we are now considering." On the other hand, the *modus operandi* may be such as to raise a presumption against the existence of a common intention to wager. This frequently happens when agreements of a speculative character are entered into through the medium of brokers, and when, according to the practice of the market, the principals are not brought into contact with each other, nor do they know the name of the person with whom they are contracting, until after the bought and sold notes are executed. Under circumstances such as these, when a party launches his contract orders he does not know with whom the contracts would be made (*n*). And this presumption is considerably strengthened when the broker is authorised by the principal to contract with third persons in his (the broker's) own name; for the third person may in such case remain undisclosed even after the contract is made (*o*). But the presumption may be

(*n*) *J. H. Tod v. Lakhmidas* (1892) 16 Bom. 441, 446. 899; *Sassoon v. Tokersey* (1904) 28 Bom. 616.

(*o*) *Perosha v. Manekji* (1898) 22 Bom.

rebutted by evidence of a common intention to wager, though the contract has been brought about by a broker. Thus in *Eshoor Doss v. Venkatasubba Rau* (p) the same broker had acted for both the plaintiff and the defendant, and it was found that, though the parties were not brought into contact at the time defendant contracted to sell Government paper to plaintiff, each had made inquiry beforehand of the broker, not whether the other would be able to deliver Government paper, but whether he would be able to pay differences, and this circumstance along with other circumstances was deemed sufficient to establish that the intention on either side was to pay differences only. The presumption against a wager was applied in a case where the transactions were in Government paper to the extent of about half a crore of rupees, and the plaintiff was both stockbroker and stockjobber, and the defendant was a stockjobber. The magnitude of the transactions in the case was set up by the defendant to support the contention that the transactions were by way of wager, and reliance was placed on the Privy Council decision in *Kong Yee Lone's* case, cited above. But the contention was overruled and the Court said: "In the Privy Council case, the defendant was a rice miller or a producer by trade, and the wager related to quantities of rice enormously out of proportion to his output and capital, deliverable at option from a number of specified mills. Here there is, I think, sufficient proof that the defendant was known in the market as the largest of jobbers (q), and the capital available for the purchases which he bargained for was at least presumably to be supplied by the constituents for whom a jobber is ordinarily supposed to be acting" (r).

S. 30.

An exception has recently been taken to the words "under no circumstances" which occur in the following passage in the judgment of Farran, J., in the case of *J. H. Tod v. Lakhmidas* (s), referred to above:—"Contracts are not wagering contracts unless it be the intention of both contracting parties at the time of entering into the contracts *under no circumstances* to call for or give delivery from or to each other."

(p) (1895) 18 Mad. 306.

(r) *Dady v. Madhuram* (1903) 5 Bom.

(q) The evidence showed that seven L. R. 768.

laes would be a small day's turnover for a big jobber in an active market.

(s) (1892) 16 Bom. 441, 445.

S. 30. On this Bachelor, J., observed in *Motilal v. Govindram* (t): "It may perhaps be doubted whether the phrase 'under no circumstances' which does not appear to have been prominently brought before the Court of Appeal in *Doshi Talakshi's* case (u), is not rather an overstatement of the requirements of the law; and upon this point I would refer to the decision in *In re Gieve*" (v). And Daver, J., said in *Hun mukhray v. Narotamdass* (w): "I have no hesitation in saying that the expression 'under no circumstances' is much too wide, and if the words of Mr. Justice Farran were to be taken too literally, their effect would be to render the provisions of s. 30 of the Contract Act more or less nugatory." On the other hand, Beaman, J., said still more lately, "I think that the dictum of Farran, J., subjected to rigorous analysis, will be found to be perfectly correct. I believe that before the Court can hold a contract, on the face of it genuine, or at any rate not clearly wagering as the contract in *In re Gieve* (x) was, to be a wagering contract, the Court must be satisfied that the intention of the parties was in no circumstances either to give or take delivery" (y). In *In re Gieve*, referred to above, the contract in terms gave the buyer an option to demand delivery upon the payment of a small excess commission. It was argued that, even if the contracts were for the payment of differences only, the power in either party to turn them into real contracts by insisting upon delivery prevented them from being wagering contracts, but the Court of Appeal disallowed the contention. Lindley, M.R., said "It is a gaming transaction plus something else. This case must be distinguished from that of a forward contract for the sale of goods, with the condition that if the seller fails to give the delivery order in time the contracts shall be settled by payment of the difference between the contract rate and the market rate prevailing on the due date. In such a case, if the seller forwards the delivery order in time to the buyer, no question arises as to payment of difference and the contract, it has been held, is not a wagering contract. As observed by Scott, C.J., "There is no authority for the proposition that because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event

(t) (1906) 30 Bom. 83, at p. 90.

136, 137.

(u) (1899) 24 Bom. 227.

(x) [1899] 1 Q. B. 794.

(v) [1899] 1 Q. B. 794, C. A.

(y) *Mathuradas v. Narbadasankar*

(w) (1907) 9 Bom. L. R. 125, at pp.

(1909) 11 Bom. L. R. 997, at p. 1004.

the contract is void as a wager, *if that event does not arise*. Such a result would be inconsistent with the principle underlying s. 57 of the Indian Contract Act" (z). But what if the seller fails to send the delivery order in time, in which case the contract is to be settled by payment of difference? The point arose in *Champsey v. Gill & Co. (u)*, where it was held that in such a case the agreement was by way of wager. That was a case of a forward contract for the sale of cotton with the condition that "if before the maturity of the contract either party thereto shall suspend payment or become bankrupt or insolvent, the other party . . . shall be bound to forthwith close the contract, and when the contract is thus closed, the measure of damages shall be the difference between the market price current at the time of closing for similar goods for delivery at the time named in the contract so closed and the rate named in the contract . . . the damages ascertained as aforesaid shall become at once payable to or by the party closing the contract." The seller suspended payment before the due date, and subsequently sued the buyer to recover the difference. Tyabji, J., held that the contract was not a wager. In appeal it was held that the contract was a wager. S. 30.

Teji Mandi Transactions.—In a Bombay case Beaman, J., held that *teji mandi* transactions were transactions by way of wager, and they were void under this section (b). In a later case, where fuller evidence was adduced, the learned Judge said: "I still, however, adhere generally to the view that in this country the rule ought to be that transactions shown to be *teji mandi* are wagering transactions, and that the onus of proving that they are not would lie heavily indeed upon the party so alleging (c). The learned Judge observed that there might be exceptional cases in which *teji mandi*, like the Liverpool double option, might represent fair business dealings.

Agreements between Pukka Adatia and his constituents:—It was at one time held in some Bombay cases that a pukka adatia was merely the agent of his constituent, and that therefore no trans-

(z) *Narbadashankar v. Mathuradas* from 7 Bom. L. R. 154.
 (1910) 12 Bom. L. R. 1058, in appeal (b) *Ramchandra v. Gangabison* (1910)
 from *Mathuradas v. Narbadashankar* 12 Bom. L. R. 590.
 (1909) 11 Bom. L. R. 997. (c) *Jessiram v. Tulcidas* (1913) 37
 (a) (1905) 7 Bom. L. R. 805, in appeal Bom. 264, at p. 272.

8. 30. action between them could be a wagering transaction. In *Bhagwandas v. Kanji (d)*, however, it was held on the evidence of custom that as regards his constituent the pukka adatia was a principal and not a disinterested middleman bringing two principals together. Since that decision it has been held by the High Court of Bombay in two cases that a transaction between a pukka adatia and his constituent may be by way of wager like any other transaction between two contracting parties, and that the existence of the pukki adat relationship does not of itself negative the possibility of a contract being a wagering contract as between them (*e*). One of those cases was taken to the Privy Council, and though the decree of the High Court of Bombay was reversed, the Judicial Committee, Privy Council, taking a different view of the facts, the principle laid down by the Bombay High Court was affirmed by that tribunal (*f*).

Agreements collateral to wagering contracts.—Thus far our observations are confined to suits between the principal parties to a contract. Different considerations apply where the suit is brought by a broker or an agent against his principal to recover his brokerage or commission in respect of transactions entered into by him as such, or for indemnity for losses (*g*) incurred by him in such transactions, on behalf of his principal.

Apart from a Bombay enactment to be presently noticed there is no statute which declares agreements collateral to wagering contracts to be void. Nor is there anything in the present section (*h*) to render such agreements void. It has accordingly been held that a broker or an agent may successfully maintain a suit against his principal to recover his brokerage, commission, or the losses sustained by him,

(*d*) (1905) 30 Bom. 205.

(*e*) *Burjorji v. Bhagwandas* (1914) 38 Bom. 204; *Chhogmal v. Jainarayan* (1915) 39 Bom. 1.

(*f*) *Bhagwandas v. Burjorji* (1918) L. R. 45 I. A. 29, 42 Bom. 373.

(*g*) See s. 222 below, which provides that the principal is bound to indemnify the agent against the consequences of all lawful acts. Since a wagering contract is void, and not unlawful, the principal, when sued, cannot be dis-

charged from liability on the ground that the loss on betting paid by his agent was the consequence of an unlawful act: *Telu Mal v. Subha Singh* (1880) Punj. Rec. no. 90; *Ragnath Sahal v. Mam Raj* (1895) Punj. Rec. no. 80.

(*h*) The expression "void" in the section does not mean unlawful: *Pringle v. Jafer Khan* (1883) 5 All. 443, 445; *Shibhomal v. Lachman Das* (1901) 23 All. 165, 166; *Juggernaut Sew Bux v. Ram Dayal* (1883) 9 Cal. 791, 796.

even though contracts in respect of which the claim is made are contracts by way of wager (i). It does not follow because a wagering contract is void that contracts collateral to it cannot be enforced. "The fact that a person has constituted another person his agent to enter into and conduct wagering transactions in the name of the latter, but on behalf of the former (the principal) amounts to a request by the principal to the agent to pay the amount of the losses, if any, on those wagering transactions" (j) and if such payment is made, the agent is entitled to recover the amount from him. Conversely, an agent who has received money on account of a wagering contract is bound to restore the same to his principal (k). On the same principle a suit will lie to recover a sum of money paid by the plaintiff for the defendant and at his request, though such sum represents the defendant's loss on a bet (l). Similarly money lent for gaming purposes (m), or to enable the defendant to pay off a gambling debt (n), is recoverable. Such transactions are neither against the provisions of the present section nor of s. 23 (o). The law is, however, different in the Presidency of Bombay. In that Presidency, contracts collateral to or in respect of wagering transactions are prevented from supporting a suit by the special provisions of Bombay Act III of 1865 (p). "That Act was passed to supply the defect which *Joravermal Sivilal v. Dadabhai Beramji* (j) and other similar cases disclosed in Act XXI of 1848 (which excluded suits on wagering transactions), and to close the

(i) *Shibho Mal v. Lachman Das* (1901) 23 All. 165; *Jagat Nardin v. Sri Kishan Das* (1910) 33 All. 219; *Bisheshwar Dayal v. Jwala Prasad* (1914) 36 All. 426; *Chekka v. Gujila* (1904) 14 Mad. L. J. 326; *Ragnath Sahi v. Mam Raj* (1895) Punj. Rec. no. 80; *Telu Mal v. Subha Singh* (1880) Punj. Rec. no. 90.

(j) *Parakh Govardhanbhai Haribhai v. Kansordas Dulabhdhas* (1875) 12 B. H. C. 51, 57. This case, though decided in 1875, was not decided under Bombay Act III of 1865, as the agreement sued upon was entered into before that Act came into operation. See also *Tribhuvandas v. Mokilal* (1863) 1 B. H. C. 34. Both these cases followed *Joravermal Sivilal v. Dadabhai Beramji*, decided by Sir M.

Sausse, C.J., in the Supreme Court of Bombay on its Plea side on 14th April 1859.

(k) *Bhola Nath v. Mul Chand* (1903) 25 All. 639; *Debi Sahai v. Ganeshi Lal* (1901) Punj. Rec. no. 46.

(l) *Pring v. Jafar Khan* (1883) 5 All. 443.

(m) *Subbaraya v. Devandra* (1884) 7 Mad. 301.

(n) *Bani Madho Das v. Kaunsal Kishor Dhusar* (1900) 22 All. 452.

(o) 22 All. 452, *supra*.

(p) This Act is still in force, though Act XXI of 1848, of which it formed part, has been repealed, and must be read with the present section so far as the Bombay Presidency is concerned:

S. 30. doors of the Courts of Justice in the Presidency to suits upon contracts collateral to wagering transactions where such collateral contracts have been entered into or have arisen since the Act came into force, a purpose which it has effectually answered" (q). Ss. 1 and 2 of the Act run as follows :—

S. 1: "All contracts, whether by speaking, writing, or otherwise knowingly made, to further or assist the entering into, effecting, or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void; and no suit shall be allowed in any Court of justice for recovering any sum of money paid or payable in respect of any such contract or contracts or any such agreement or agreements as aforesaid."

S. 2: "No suit shall be allowed in any Court of justice for recovering any commission, brokerage fee, or reward in respect of the knowingly effecting or carrying out or of the knowingly aiding in effecting or in carrying out or otherwise claimed or claimable in respect of any such agreements by way of gaming or wagering or any such contract as aforesaid, whether the plaintiff in such suit be or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage fee, or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid."

But the transaction in respect of which the brokerage, commission, or losses are claimed must amount to a wagering agreement, and it is no answer to a suit by a broker in respect of such a claim against his principal that, so far as the defendant was concerned, he entered into the contracts as wagering transactions with the intention of paying the differences only, and that the plaintiff must have known of the inability of the defendant to complete the contracts by payment and delivery, having regard to his position and means. It must, further, be shown that the contracts which the plaintiff entered into with third persons on behalf of the defendant were wagering contracts as between the plaintiff and those third persons (r). It has also been held that a deposit paid on a wagering contract cannot be recovered in a case

Dayabhai Tribhovandas v. Lakhmichand Panachand (1885) 9 Bom. 358, 362; *Perosha v. Manekji* (1898) 22 Bom. 899, 902; *Doshi Talakshi v. Shah Ujamesi Velsi* (1899) 24 Bom. 227, 232.

(q) *Per Westropp, C.J., in Parakh*

Govardhanbhai Haribhai v. Ransordas Dulabhdhas (1876) 12 B. H. C. 51, 58. (r) *Perosha v. Manekji* (1898) 22 Bom. 899, 907; *Sassoon v. Tokersey* (1904) 28 Bom. 616.

subject to the provisions of s. 1 of the Bombay Act, whether the person suing is a winner or a loser in the transaction (s). Nor can such a deposit be recovered under s. 65 of the Contract Act; "for if the agreement was one merely to pay differences, its nature must necessarily have been known to the plaintiff and defendant at the time when they entered into it, and they must be presumed to have known also that it was void (t). S. 30.

The result therefore is that, though an agreement by way of wager is void, a contract collateral to it or in respect of a wagering agreement is not void except in the Bombay Presidency. In England also before the enactment of the Gaming Act of 1892 (55 Vict. c. 9) agreements collateral to wagering contracts were not void. Thus in *Read v. Anderson* (u) a betting agent at the request of the defendant made bets in his own name and on behalf of the defendant. After the bets were made and lost the defendant revoked the authority to pay conferred upon the betting agent. Notwithstanding the revocation the agent paid the bets, and sued the defendant to recover the amounts thereof. It was held that, the defendant having empowered the agent to bet in his name, the authority was irrevocable, and that the agent was entitled to judgment. The statute of 1892, passed in consequence of this decision, is almost to the same effect as the Bombay Act. It is interesting to note that the statute was not passed until twenty-seven years after the Bombay Act. It may be hoped that in any future revision of the Contract Act the provisions of the Bombay Act will be incorporated in the present section, so as to render the law uniform on this subject in the whole of British India.

Speculative transactions.—Speculative transactions must be distinguished from agreements by way of wager. This distinction comes into prominence in a class of cases where the contracts are entered into through the medium of brokers. The *modus operandi* of the defendant in this class of cases is, when he enters into a contract of purchase, to sell again the same quantity deliverable at the same time in one or more contracts, either to the original vendor or to some one else, so as either to secure the profit, or to ascertain the loss, before

(s) *Dayabhai Tribhovandas v. Lakhmichand Panachand* (1885) 9 Bom. 358; (t) (1885) 9 Bom. 358, at p. 362.
Ramchandra v. Gangabison (1910) 12 (u) (1887) 13 Q. B. D. 779.

8. 0. the *voida* day ; and, when he enters into a contract of sale, to purchase the same quantity before the *voida* day. This mode of dealing, when the sale and purchase are to and from the same person, has the effect, of course, of cancelling the contracts, leaving only differences to be paid. When they are to different persons, it puts the defendant in a position vicariously to perform his contracts. This is, no doubt, a highly speculative mode of transacting business ; but the contracts are not wagering contracts, unless it be the intention of *both contracting parties*, at the time of entering into the contracts, neither to call for nor give delivery from or to each other. "There is no law against speculation, as there is against gambling" (v). It may well be that the defendant is a speculator who never intended to give delivery, and even that the plaintiffs did not expect him to deliver ; but that does not convert a contract, otherwise innocent, into a wager. Speculation does not necessarily involve a contract by way of wager, and to constitute such a contract a common intention to wager is essential (w). It is in cases of the above description that 'there is a danger of confounding speculation, or that which is properly described as gambling, with agreements by way of wager ; but the distinction in the legal result is vital' (x). It was this *modus operandi* that was adopted by the defendant in *Tod v. Lakhmidas* (y), where the dealings were in Broach cotton, *Perosha v. Manekji* (z) where the dealings were in Government paper and shares of a spinning and weaving company, and in *Sassoon v. Tokersey* (a), where the dealings were in American futures. In all these cases the contracts were entered into through a broker. In the first of these cases the contracts were made by bought and sold notes, so that the principals would not be brought into contact with each other until after the bought and sold notes were executed. This would at once raise a presumption against the existence of a common intention to wager. In the second and third cases the contracts were made by the broker with third persons in his own name on behalf of the defendant according to the practice of the trade. Here the presumption against the existence of a common

(v) *J. H. Tod v. Lakhmidas* (1892) 16 Bom. 441, at pp. 445, 446. (y) (1892) 16 Bom. 441.
 (w) *Bhagwandas v. Burjorji* (1917) L. R. 45 I. A., 29, 33, 42 Bom. 373. (z) (1938) 22 Bom. 899.
 (x) *Sassoon v. Tokersey* (1904) 28 Bom. 616. (a) (1904) 28 Bom. 616.

intention to wager is still stronger, for the defendant may not know S. 30. at all with whom the broker had contracted on his behalf. The broker may be a *sutta* broker or a mere agent for gambling, but this fact is immaterial, for he is not a contracting party, and it is the intention of the *contracting* parties alone that is material in these cases (b). In each of the above cases it was contended for the defendant that the contracts sued upon were wagering contracts, but in each it was held that, though the transactions were of a highly speculative character, and though, so far as the defendant personally was concerned, he entered into the contracts as gambling transactions, there was no evidence to show that the *other* contracting party had also the intention to gamble. "The Indian Contract Act in section 30 provides that agreements by way of wager are void; but that a transaction may fall within this provision of the law there must be at least two parties, the agreement between them must be by way of wager, and *both* sides must be parties to that wager" (c). In the last two cases the suit was by the broker as plaintiff to recover from the defendant the loss paid by the plaintiff on behalf of the defendant.

Oral evidence of agreement being by way of wager.—Though an agreement in writing may ostensibly be for the purchase and sale of goods deliverable on a certain day, oral evidence is admissible to prove that the intention of the parties was only to pay the difference. Such "intention" is a "fact" within the meaning of s. 3 of the Evidence Act (see cl. 1, illustration (d)), and it may be proved by oral evidence under s. 92, proviso 1, of the same Act, as, if proved, it would invalidate the agreement under the provisions of the section now under consideration (d). The same principle has been reiterated in recent cases following the English case of *Universal Stock Exchange, Ltd. v. Strachan*, (e).

(b) *Perosha v. Manekji* (1898) 22 Bom. 899, 907; *Sassoon v. Tokersey* (1904) 28 Bom. 616, 624. The observation in the judgment in *Tod v. Lakhmidas* on p. 446 of the report, that the broker there "was not shown to be a *sutta* broker though no doubt a good many of the contracts he negotiated were settled by differences," does not imply that the decision would in any way have been affected if the

broker were proved to be a *sutta* broker (c) *Sassoon v. Tokersey* (1904) 28 Bom. 616, at p. 621.

(d) *Anupchand Hemchand v. Champai Ugerchand* (1888) 12 Bom. 585, dissenting from *Juggernaut Sew Bux v. Ram Dyal* (1883) 9 Cal. 791. See also *Magarbhai v. Manchhabhai* (1806) 3 B. H. C. O. C. 79.

(e) [1896] A. C. 166.

- S. 30. Thus in a Bombay case (*f*) Tyahji, J., said: "In order to ascertain the real intention of the parties the Court must look at all the *surrounding circumstances*, and would even go behind a written provision of the contract to judge for itself whether such provision was inserted merely for the purpose of concealing the real nature of the transaction." And in another Bombay case (*g*) Jenkins, C.J., said: "The law says that we must find, as best we can, the true intention of the parties; we must not take them at their written word, but we must probe among the surrounding circumstances to find out what they really meant. . . . We are not, and we must not be, bound by the mere formal rectitude of the documents if in fact there lurks behind them the common intention to wager, and parties cannot be allowed to obtain from the Courts any sanction for their wagers merely because they use a form which is not a true expression of their common purpose and intention. The [*surrounding circumstances*] and the *position of the parties* and the *history of dealings* of this class are legitimate, though not exclusive, matters for our investigation into the true intention of the parties." In a still later case (*h*) Davar, J., said: "What the Court has to do is not simply to look at the transactions as they appear on the face of them, but to go behind and beyond them, and ascertain the true nature of the dealings between the parties by probing into surrounding circumstances and minutely examining the position of the parties and the *general character of the business* carried on by them." "In this class of suits it would be almost idle to expect to get at the truth unless the Court takes the widest possible outlook consistent with the provisions of the Indian Contract Act; otherwise the result would be that the statute could be violated with impunity by the simple and habitual device of cloaking wagers in the guise of contracts" (*i*). Thus the conduct of the parties in the matter of the transaction in question is relevant for if no delivery is asked for or offered, the presumption is that the transaction was a wager on the rise or fall of the market (*j*). In *Motilal v. Govind-*

(*f*) *Perosha v. Manekji* (1898) 22 Bom. 899, 903.

(*g*) *Doshi Talakshi v. Shah Ujamsi Velsi* (1899) 24 Bom. 227, 230.

(*h*) *Hurmukhrai v. Narotamdas* (1907) 9 Bom. L. R. 125, at p. 137.

(*i*) Per Bachelor, J., in *Motilal v. Govindram* (1906) 30 Bom. 83, at p. 99.

(*j*) *Motilal v. Govindram* (1906) 30 Bom. 83, 95; *Eshoor Doss v. Venkatsubba Rau* (1895) 18 Mad. 306, 309.

ram (k), the fact that the plaintiff took the *panch* rate as the measure of his damages, and not the market rate, was held to be a plain indication that the parties never intended to give and take delivery. The means and ability of the parties to perform the contract in question are also relevant (l). The general character of the plaintiff's business is also material, for if it appears that the normal and regular course of the plaintiff's transaction was to pay and receive differences only, the presumption is that the transaction in question was merely a bargain for differences. This presumption was applied in a case where the plaintiff dealt in several lacs of Government paper, and the evidence showed that he neither delivered nor received Government paper except on one single occasion just before he brought the suit (m). It was also applied in a case where the plaintiff's transactions in linseed amounted to about 350,000 cwts. in two years, and the only linseed actually delivered during that period was 2,219 cwts., and that too under exceptional circumstances (n). To determine the general character of the plaintiff's business, the Court ought to inquire how other contracts that may have been entered into by the plaintiff with the same defendant, or even with third parties, and relating to the goods in question, were previously performed by the plaintiff, whether by payment of differences or by delivery of goods. Thus where it appeared that at the *vaida* for which the contracts in question had been made the plaintiff had neither given nor taken any delivery of any cotton, it was held that the evidence tendered by the plaintiff to show that at *other va das* he had given and taken delivery of cotton was admissible, and that the lower Court was wrong in excluding this evidence (o). Upon the same principle, evidence is admissible to show that in the case of a particular class of contracts, or of contracts relating to a particular commodity, the normal course of dealing is to pay differences only. Thus in *Motilal v. Govindram* (p), where the question was whether certain forward contracts between two Marwari firms for the sale and delivery of linseed were gambling

S. 30.

(k) (1906) 30 Bom. 83, 96.

(1895) 18 Mad. 306, 308, 309.

(l) *Kong Yee Lone & Co. v. Lowji*(n) *Motilal v. Govindram* (1908) 30*Nanjee* (1901) 29 Cal. 461, 467 (foot)

Bom. 83, 93.

469; *Kesarichand v. Merwanjee* (1899)(o) *Chandulal v. Sidhruthrai* (1905)1 Bom. L. R. 263, 264; *Perasha v. Manek-*

25 Bom. 291.

ji (1898) 22 Bom. 899, 907.

(p) (1906) 30 Bom. 83, 92.

(m) *Eshoor Doss v. Venkatarubba Rau*

S. 30. transactions, evidence was admitted which showed that contracts of similar form were commonly made in the Marwari bazar in Bombay in Samvat 1957 with no intention of giving or taking delivery of linseed, but with the sole object of gambling in differences. This evidence was objected to on the ground that it was *res inter alios acta*, but the objection was overruled, Bachelor, J., observing, "In admitting this evidence as to the real character of precisely similar agreements made under the same conditions of time and place and circumstances I do not think that I am straining the provisions of the Evidence Act, *e.g.*, s. 7 (g), and I may call in aid a passage from the judgment of Jenkins, C.J., in *Doshi Talakshi's* case (r); there the learned Chief Justice, in speaking of the 'surrounding circumstances' of the agreements in that case, says that these circumstances 'and the position of the parties and the history of dealing: of this class are legitimate, though not exclusive, matters for our investigation into the true intention of the parties.'" In *Doshi Talakshi's* case, it will be remembered, the question was whether certain contracts entered into in Dholera for the sale of Broach cotton and the delivery thereof in Bombay were wagering contracts, and evidence was admitted to show that, with one doubtful exception, no contracts similar to those in the suit were completed otherwise than by payment of differences. In *Sassoon v. Tokersey* (s) evidence was admitted which showed that under contracts for the sale and purchase of American cotton incorporating the rules of the Liverpool Cotton Association delivery does take place to a considerable extent.

Wagering Policies.—The cases of life insurance and marine insurance afford illustrations of another variety of wagering contracts. In England a policy of insurance on the life of a person in which the insurer has no interest is void by 14 Geo. III. c. 48. That Act forbids insurance "on the life or lives of any person or persons or on any other event or events whatsoever wherein the person or persons for whose use, benefit, or whose account such policy or policies shall be made shall have no interest or by way of wagering or gaming." This statute does not appear to apply to British India (t).

(7) "Facts which . . . constitute the state of things under which they (facts in issue) happened, are relevant."

(r) (1899) 24 Bom. 227, at p. 231.

(s) (1904) 28 Bom. 616, 624.

(t) It is not in the Collection of Statutes relating to India, published by the Government of India, in 1899, in two volumes.

In *Alamai v. Positive Government Security Life Insurance Co.* (u) S. 30. the High Court of Bombay held that in India an insurance for a term of years on the life of a person in whom the insurer had no interest was void under this section. In that case the defendant company issued a policy for a term of 10 years for Rs. 25,000 on the life of Mehbub Bi, the wife of a clerk in the employ of the plaintiff's husband. About a week after Mehbub Bi assigned the policy to the plaintiff. Mehbub Bi died a month later, and the plaintiff as assignee of the policy sued to recover Rs. 25,000 from the defendants. It was held on the evidence that the policy was not effected by Mehbub Bi for her own use and benefit, but had been effected by the plaintiff's husband for his own use and benefit, and that it was void as a wagering transaction, he having no interest in the life of Mehbub Bi.

In a recent Madras case (v) the plaintiff lent a sum of money to the defendants on the risk of a ship belonging to them. On 3rd August, 1896, the defendants passed a writing to the plaintiff which, after reciting the loan on the risk of the ship "now under sail to Nicobars" from Negapatam, provided for the payment by the defendants to the plaintiff on 20th March, 1897, of the loan, with interest thereon at the rate of 18 per cent. per annum, if the ship returned safe to Negapatam after completion of her voyage, but that if she did not return the plaintiff lost his money. The ship had left Negapatam on 23rd July, 1896, and was lost at sea three days later. In a suit by the plaintiff to recover the amount of the loan on the ground that the ship was lost before the date of the agreement, it was held that the agreement was by way of wager and void under this section. Davies, J., said that agreements similar to this were in vogue in England up to the time of the passing of 19 Geo. II. c. 37 under the names sometimes of *fenus nauticum* and sometimes *usura maritima*, but as they were considered to give an opening for usurious and gaming contracts, they were forbidden by that statute.

Promissory note for debt due on a wagering contract.—Agreements by way of wager being void, no suit will lie on a promissory note for a debt due on a wagering contract. Such a note must be regarded "as made without consideration"; for "a contract which

(u) (1898) 23 Bom. 191.

malai Chelli (1901) 25 Mad. 561.

(v) *Vappakundu Marakayar v. Anna-*

5. 30. is itself null and void cannot be treated as any consideration for a promissory note" (w).

Suit to recover deposit.—The prohibition contained in this section as regards the recovery of money deposited pending the event of a bet applies only to the case of winners. The winner of a wager or a bet cannot sue to recover the amount deposited by the loser with the stake-holder, but it is quite competent to the loser to recover back his deposit before the stake-holder has paid it over to the winner. In a case, however, governed by the provisions of Bombay Act III of 1865, even a loser cannot recover back the deposit (x).

Lotteries.—s. 294A of the Indian Penal Code makes it penal to keep any office or place for the purpose of drawing any lottery not authorised by Government or to publish any proposal to pay any sum, or to deliver any goods, or to do or forbear doing anything for the benefit of any person on any event or contingency relative or applicable to the drawing of any ticket, lot, number, or figure in any such lottery.

Before the enactment of this section of the Code lotteries not authorised by Government were prohibited in India by Act V of 1844. The Act declares all such lotteries "common and public nuisances and against law." The Act was repealed by the Penal Code Amendment

(w) *Trikum Damodhar v. Lalit Amirchand* (1871) 8 B. II. C. A. C. 131. See also *Doshi Talakshi v. Shah Ujamsi Velsi* (1899) 24 Bom. 227; *Perasha v. Manekji* (1898) 22 Bom. 899; *Kong Yee Lone & Co., v. Lowjee Nanjee* (1901) 29 Cal. 461, L. R. 28 I. A. 239. In England the law is complicated by statutory provisions which have been the subject of much doubt. Securities for money won at gaming, etc., or lent for the like purposes, are treated as given on an *illegal* consideration: 5 & 0 Wm. 4, c. 41, s. 1; and money paid to satisfy gaming debts at the loser's request, and loans of money to be used in wagering and to be repaid only if the borrower wins, are not recoverable: Gaming Act, 1832; *Re O'Shea* [1911] 2 K. B. 981.

Yet forbearance to sue on a gaming security, or to enforce it by the social pressure of declaring the debtor in default, has been held to be a good consideration by the majority of the C. A. *Hyams v. Stuart King* [1908] 2 K. B. 696; see Prof. Dicey's criticism in L. Q. R. xxv. 76, pointing out that the practical result is to make gambling debts recoverable. Decisions on the terms of English statutes can, of course, have no direct application in India.

(x) *Ramechandra v. Gangabison* (1910) 12 Bom. L. R. 590; *Dayabhai Tribhovanadas v. Lakhmichand Panachand* (1885) 9 Bom. 338. English decisions to the same effect are collected in *Burge v. Ashley and Smith* [1900] 1 Q. B. 744.

Act XXVII of 1870, and in its place s. 294A was inserted in the Code S. 30.
(see s. 10 of the amending Act).

Where a particular association is authorized by the Government of India by a letter to hold a lottery, the effect is that no prosecution would lie under the criminal law. But a sale or purchase of a ticket in such a lottery will still be a wagering contract under this section as well as under the Bombay Act; for the Government cannot by a letter overrule the Imperial Act or the Acts of the Local Legislature (y).

What is a Lottery?—"Lotteries ordinarily understood are games of chance in which the event of either gain or loss of the absolute right to a prize or prizes by the person concerned is made wholly dependent upon the drawing or casting of lots, and the necessary effect of which is to beget a spirit of speculation and gaming that is often productive of serious evils." It was so stated in a Madras case (z) where an agreement was entered into between twenty persons whereby it was provided that each should subscribe Rs. 200 by monthly instalments of Rs. 10, and that each in his turn, as determined by lot, should take the whole of the subscriptions for one month. The defendant contributed Rs. 10 every month for a period of ten months, and in the tenth month he got his lot of Rs. 200. Thereupon a bond was taken from him by the plaintiff, who was the agent in the business, for the remaining Rs. 100 in order to ensure the future regular payment of monthly instalments for the further period of ten months. In a suit upon the bond it was contended that the transaction was illegal as being a lottery within the meaning of Act V of 1844, and that the suit therefore could not be maintained. It was held that the transaction did not amount to a lottery. The Court said: "Here no such lottery appears to have taken place. It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all got a return of the amount of their contribution. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of their contributions nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded, nor any gain made a matter of chance."

(y) *Dorabji Tata v. Bance* (1918) 42 Bom. 876. The lottery in this case was a War Loan Lottery. (z) *Kamakshi Achari v. Appavu Pillai* (1863) 1 M. H. C. 448.

CHAPTER III.

OF CONTINGENT CONTRACTS.

31.—A “contingent contract” is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

“Contingent contract” defined.

Illustration.

A. contracts to pay B. Rs. 10,000 if B.’s house is burnt. This is a contingent contract.

Of the section in general.—This short chapter of the Act appears to be the original work of the legislative department. There are some clauses on the subject in the draft prepared in England, but their language is quite different. We do not know why the word “contingent,” familiar to English lawyers only in the law of real property, was preferred to “conditional.” The general principle is thus stated by the late Mr. Leake, the most comprehensive and accurate of English text-writers: “Promises may be absolute or conditional. An absolute promise is due immediately, and independently of any event or contingency; as a debt due and payable at the present time. . . . A conditional promise is one of which the performance becomes due only after a lapse of time, or upon the happening of some event, certain or uncertain” (a).

In the text of the Act the words “some event collateral to such contract” are not very clear. They seem on the whole to mean that the event is neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise. Thus, if I offer a reward for the recovery of lost goods, there is not a contingent contract; there is no contract at all unless and until some one, acting on the offer, finds the goods and brings them to me. So, if I tell B. I will pay him Rs. 1,000 if he marries C., this is not a contingent contract but merely an offer which will become a contract if, without any revocation of it in the meantime, B. does marry C.; and therefore illustration (c) to s. 32 and the illustration to s. 34, below must be read as implying that the agreement is made for some present and independent

(a) Leake on Contracts, Part III., chap. ii., p. 454, 6th ed.

consideration. Again, a contract to pay a man for a piece of work is very commonly made on the terms that he is to have no pay till the work is all done; but the completion of the work, being the very thing contracted for, is not collateral to the contract, and the contract is not properly said to be contingent, though the performance of the work may be and often is to be a condition precedent to the payment of the wages. S. 31.

The illustration to this section is the ordinary one of a contract of fire insurance. All contracts of insurance and indemnity are obviously contingent. So are many other kinds of contracts in both great and small matters. A wager is a contingent agreement, but s. 30 prevents it from being a contract. A contract between A. and Z. that if A. succeeds in his suit with regard to certain land in the possession of Z. he shall purchase the land from Z. for Rs. 300 is contingent (b). This, however, is not a common type of contract. A contract to supply a man, in return for a fixed payment, with extracts of newspaper articles or paragraphs relating to a given subject which may appear during a given time is contingent; for the duty arises only if and when such matter is published in one of the journals contemplated by the parties. Here the contingent events do not in any necessary or probable way depend on the promisor's will; but in many cases—as, for example, a sale on approval—the contingency may depend on an act of discretion to be exercised by him.

Contingency dependent on act of party.—The distinction just now mentioned requires some further explanation. Words of promise amount to no promise at all if their operation is expressed to be dependent, in terms or effect, on the mere will and pleasure of the promisor, as if a man says that for a certain service he will pay whatever he himself thinks right or reasonable (c). But the operation of a promise may well be dependent on a voluntary act other than the mere declaration of the promisor's will to be bound. The act may be that of a third person; thus a promise to pay what A. shall determine is perfectly good. The act may also be that of the promisor himself, so long as it is not an act of mere arbitrary choice whether he will be bound or not, as in the common case of goods being sold on approval, where the

(b) *Isml v. Daudbhai* (1900) 2 Bom. L. R. 118.

(c) *Roberts v. Smith* (1859) 4 H. & N. 315; 118 R. R. 462.

8. 31. sale is not completed until the buyer has either approved the goods or kept them beyond the time allowed for trial (*d*). So, in the case of goods to be manufactured to order, it may be a term of the contract that the work shall be done to the customer's approval, and then the customer's judgment, acting "*bonâ fide* and not capriciously," is decisive (*e*). A builder's right to recover for his work is often made conditional on the architect certifying that the work has in fact been done and properly done, and such a condition is good (*f*). Payment of a policy of insurance may be conditional on proof of the claim satisfactory to the directors of the insurance company being furnished; this means such proof as they may reasonably require (*g*).

The English authorities were considered, and the principle applied by the High Court of Madras in *Secretary of State for India v. Arathoon* (*h*). The plaintiff had entered into a contract to supply Government with a certain quantity of timber. One of the terms of the contract was that the timber should be of unexceptionable quality and should be liable to be rejected if not approved by the Superintendent of the Gun Carriage Factory, for which it was required. The timber tendered was not approved by the Superintendent, and was accordingly rejected. The plaintiff sued for breach of the contract, contending that the timber which he tendered answered the description in the contract. It was not alleged that the Superintendent failed to exercise a judgment in regard to the suitability of the wood. The lower Court held that, the Superintendent being substantially a party, his judgment could not be regarded as conclusive, and that it was open to the plaintiff to show that his tender ought to have been accepted, but the Madras High Court reversed this decision, holding that it was not open to the plaintiff to question the reasonableness of the Superintendent's disapproval. Innes, Offg. C.J., said: "The rule of the Civil Law that a condition the happening of which is at the will of the party making it is null and void as being destructive of the contract (Dig.

(*d*) *Elphick v. Barnes* (1880) 5 C. P. D. 321.

(*e*) *Andrews v. Belfield* (1857) 2 C. B. N. S. 779; 109 R. R. 885.

(*f*) *Morgan v. Birnie* (1833) 9 Bing. 672; 35 R. R. 65; *Clarke v. Watson* (1865) 18 C. B. N. S. 278.

(*g*) *Braunstein v. Accidental Death Insurance Co.* (1861) 1 B. & S. 782; 124 R. R. 745.

(*h*) (1879) 5 Mad. 173. Here, as too frequently in India, failure to report the argument has made the judgments obscure.

XLV. Tit. 1, 108) probably relates to [cases] where the promisor is not bound to exercise a discretion, as a promise by one to give 'if I am so minded,' for sales and other contracts on a condition the happening of which was entirely subject to the result of a mental process of discrimination on the part of one party were undoubtedly recognised as valid. (See Dig. XVIII. Tit. 1, *De Contrahenda Emtione*; see also Pothier, Part I. chap. i. art. iii. s. 7.) At all events, it is not a rule of the Indian law of contracts, and it may be doubted if it is a rule of the English law." If this means that the Common Law will give effect to a merely illusory promise, it is not correct; but that which "is not a rule of the Indian law of contracts" seems to be the Civil Law not as the learned Judge himself thought it was, but as some one else had suggested. There does not appear to be any real difference here between English and Roman law. Muttusami Ayyar, J., in his following judgment, quoted a not very clear illustration, as from Windscheid's Pandekten, which we have been unable to identify in that author's text.

Conversely the operation of penal clauses in a contract may be made to depend not only on some default of one party, but on the decision of a person appointed by the other party that a default contemplated by the contract has taken place. In *Aghore Nauth Bannerjee v. The Calcutta Tramways Co., Ltd.* (i), a conductor on taking service with the defendant company deposited a sum of money with them as security for the performance of his duties subject to the condition that the deposit should be forfeited if there was any dereliction of duty on his part, as to which the certificate of the company's manager was to be conclusive. In a suit by the conductor to recover the amount of his deposit the Court held that he was bound by the certificate of the manager, and that the manager was no more the company than the engineer or architect who is constituted the arbitrator, under a contract for works, to settle disputes as to extras or penalties, is identical with the person or body for whom the work is done. The case, however, was argued and decided on s. 28.

In some kinds of contracts, especially for the sale or letting of immovable property, clauses are commonly inserted expressly giving one or both of the parties an option to rescind the contract in specified

(i) (1885) 11 Cal. 232, cited in the commentary on s. 28, *ante*.

s. 31, 32. events. In such cases, and in other cases where there is a complete and active obligation from the first, though subject to be defeated by matter subsequent, it does not seem that the contract can properly be called contingent.

32.—Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

Enforcement of contracts contingent on an event happening.

If the event becomes impossible, such contracts become void.

Illustrations.

(a) A. makes a contract with B. to buy B.'s horse if A. survives C. This contract cannot be enforced by law unless and until C. dies in A.'s lifetime.

(b) A. makes a contract with B. to sell a horse to B. at a specified price if C., to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C. refuses to buy the horse.

(c) A. contracts to pay B. a sum of money when B. marries C. C. dies without being married to B. The contract becomes void.

--There are some cases which may be dealt with either under this section or s. 56, for it may be equally true to say that performance of a material part of the contract has become impossible, and that the contract was made on the contingency of an event which has become impossible; or it may be hard at first sight, at any rate, to say which section is the more applicable. See notes on s. 56, p. 322 *sqq.*, below, and *Krell v. Henry (j)*, where a contract to hire the use of a room in London to view the intended coronation procession of June, 1902, was held, in effect, to be conditional on the procession taking place.

Whether a contract is of the kind specified in this section is in each case a question of fact. This section was relied upon in a recent case before the Judicial Committee, who held on the construction of the document that it operated as an unconditional undertaking on

the defendant's part to procure a loan and out of the loan to repay the money due to the plaintiff (*k*). Ss. 32-

33.—Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.

Enforcement of contracts contingent on an event not happening.

Illustration.

A. agrees to pay B. a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.

34.—If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person.

Illustration.

A. agrees to pay B. a sum of money if B. marries C. C. marries D. The marriage of B. to C. must now be considered impossible, although it is possible that D. may die and that C. may afterwards marry B.

—Ss. 32 and 33 cannot be made plainer by any commentary. S. 34 is in accordance with very old English authority. A man who has contracted to sell and convey a piece of land to A. on a certain date breaks his contract by conveying it to Z. before that date, though he might possibly get the land back in the meantime (*l*). English cases on conditional gifts in wills ought not to be cited in this connection, the rules applicable to the construction of wills being in some respects peculiar. The illustration to the section, in which it must be assumed that A.'s agreement is made for some distinct consideration, as otherwise it would be merely a proposal, may therefore be taken as declaring the common law.

(*k*) *Vissanji Sons & Co. v. Shapurji* (1) Choke, J., Y. B. 21 Ed. IV. 55, pl. (1912) 36 Bom. 387, L. R. 39 I. A. 152. 26.

Ss. 35, 36.

35.—Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible.

When contracts become void which are contingent on happening of specified event within fixed time.

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

When contracts may be enforced which are contingent on specified event not happening within fixed time.

Illustrations.

(a) A. promises to pay B. a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year; and becomes void if the ship is burnt within the year.

(b) A. promises to pay B. a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

36.—Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Agreement contingent on impossible events void.

Illustrations.

(a) A. agrees to pay B. 1,000 rupees if two straight lines should enclose a space. The agreement is void.

(b) A. agrees to pay B. 1,000 rupees if B. will marry A.'s daughter C. C. was dead at the time of the agreement. The agreement is void.

—The two last foregoing sections explain themselves. Before leaving this chapter we may note that somewhat similar provisions as to transfers of property made subject to conditions occur in the Transfer of Property Act, 1882; see especially ss. 25–34. A conditional

transfer of property, though it may be, and often is, made in pursuance Ss. 36, 37. of a contract, is not, of course, itself a contract. It was therefore necessary to lay down distinct and independent, though more or less analogous, rules for such transactions.

CHAPTER IV.

OF THE PERFORMANCE OF CONTRACTS.

Contracts which must be performed.

37.—The parties to a contract must either perform, or
Obligation of parties to contracts. offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisors in case of the death of such promises before performance unless a contrary intention appears from the contract.

Illustrations.

(a) A. promises to deliver goods to B. on a certain day on payment of Rs. 1,000. A. dies before that day. A.'s representatives are bound to deliver the goods to B., and B. is bound to pay the Rs. 1,000 to A.'s representatives.

(b) A. promises to paint a picture for B. by a certain day, at a certain price. A. dies before the day. The contract cannot be enforced either by A.'s representatives or by B.

Performance and discharge.—A contract, being an agreement enforceable by law (s. 2, p. 14, above) creates a legal obligation, which subsists until discharged. Performance of the promise or promises remaining to be performed is the principal and most usual mode of discharge, but there are several others. Accordingly the usual methods of approved text-writers is to make discharge of Contract a main head of the subject, and treat of Performance and other ways of discharge, such as agreement of the parties, breach of the contract, and operation of law, under distinct chapters or subdivisions, as may be seen in the works of the late Mr. Leake and of Sir W. Anson. This Act, for some reason which does not appear, has made "The Performance of

- §. 37. Contracts " the principal title, with the somewhat curious result of including under it a group of sections (62—67) on " Contracts which need not be performed." Whatever may be the merits of this innovation, elegance is not one of them. It is sufficient for practical purposes, however, if the law is intelligibly stated in some kind of coherent order.

The sections (51—58) on the Performance of Reciprocal Promises really belong to the head of Interpretation, which is not separately dealt with by the Act.

This section has some resemblance to a clause of the original draft (cl. 30), which, however, seems rather intended to define what performance is sufficient than to lay down any duty of performance in general. As to performance by an agent, see s. 40, below. The rule of the Common Law which is here affirmed in the second paragraph was stated in England in 1869 by Willes, J., a judge of very great learning and authority: " Generally speaking, contracts bind the executor or administrator, though not named. Where, however, personal considerations are of the foundation of the contract, as in cases of principal and agent and master and servant, the death of either party puts an end to the relation (*m*); and, in respect of service after the death, the contract is dissolved, unless there be a stipulation express or implied to the contrary " (*n*).

Such personal considerations as are here mentioned extend, as shown by illustration (b) to the present section, to contracts involving special personal confidence or the exercise of special skill (*cp.* s. 40, p. 287, below). They do not extend to mere exercise of ordinary discretion. The executors of a man who has ordered goods deliverable by instalments under a continuing contract may be bound to accept the remaining instalments, for the duty or discretion of seeing that the goods supplied are according to contract does not require any personal qualification (*o*).

Succession to benefit of contract.—Neither the present section nor anything else in the Act lays down any rule as to the manner in

(*m*) The use of "relationship" as equivalent to "relation" in this sense has been common for some years, but is improper. Willes, J., would certainly not have approved it. (*n*) *Farrow v. Wilton*, L. R. 4 C. P. 744, 746. (*o*) *Wentworth v. Cock* (1839) 10 A. & E. 42, 50 R. R. 316.

which or the extent to which persons other than the original promisee may become entitled to enforce a promise. 8. 31

Generally the representatives of a deceased promisee may enforce subsisting contracts with him for the benefit of his estate. It is no real exception to this rule that in some cases the nature of the contract is in itself, or may be made by the intention of the parties, such that the obligation is determined by the death of the promisee. The most obvious example is the contract to marry in the Common Law. Another more seeming than real exception is where performance by the other party is conditional on some performance by the deceased which was not completed in his lifetime and is of such a personal character that performance by his representatives cannot be equivalent. An architect's executor, for example, cannot insist on completing an unfinished design, even if he is a skilled architect himself; and accordingly he cannot fulfil the conditions on which payment, or further payment, as the case may be, would have become due. But a builder's executors may be entitled and bound to perform his contracts for ordinary building work, for they have only to procure workmen of ordinary competence, and similarly in other cases. It is to be remembered that all rules of this kind are in aid of the presumed intention of the parties, and if the parties have expressed a special intention it must prevail.

Payments actually earned and due to a man before his death, though for services of a confidential or personal kind, are a portion of his estate as much as any other debts, and accordingly his representatives succeed to his right of action for them, and may recover them. This is indeed, as a general proposition, elementary, though doubts may be raised on particular facts as to what were exactly the rights acquired by an original contracting party in his lifetime (*p*). The same rule applies to rights of action for conventional damages or penalties (*q*).

(*p*) *Stubbs v. Holywell R. Co.* (1867). L. R. 2 Ex. 311. The argument for the defendant was that the contract was really entire, and the payment by instalments only a matter of convenience, and that the full performance of the contract had become impossible by the original party's death. But such an argument could be maintained only by shewing

that in his lifetime he could not have sued for any instalment until he had done the whole of the work, which would reduce the contract to an absurdity. His death put an end to the contract, but did not destroy rights of action which he had already acquired.

(*q*) *Beckham v. Drake* (1849) 2 H. L. C. 579; 81 R. R. 301.

s. 37. But a cause of action for damages for injuries of a merely personal nature, though arising out of a breach of contract, cannot be sued upon by or against executors (*r*). So it is in the case of breach of promise of marriage in England, at all events unless special pecuniary damages can be proved (*s*); and so it is understood to be with regard to personal injuries caused by negligence in the performance of a contract, though, as above mentioned, a sum agreed in the party's lifetime as compensation even for such injuries is part of his personal estate, and the right to sue for it passes to his representatives.

"Although a right of action for not marrying or not curing, in breach of an agreement to marry or cure, would not generally pass to the assignees [in bankruptcy], I conceive that a right to a sum of money, whether ascertained or not, expressly agreed to be paid in the event of failing to marry or to cure, would pass" (*t*).

The rights of an insolvent debtor's assignees to sue on his contracts depend, of course, on statute; but in the absence of more specific provisions they are governed by the same principles as an executor's. See Notes to s. 97 below.

Assignment of contracts.—Broadly speaking, the benefit of a contract can be assigned, but not the burden, subject to the same exception of strictly personal contracts that has been mentioned as affecting the powers and duties of executors. The principles were lately laid down anew by the Court of appeal in England: "Neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to some one else; this can only be brought about by the consent of all three, and involves the release of the original debtor. . . . On the other hand, it is equally clear that the benefit of a contract can be assigned, and wherever the consideration has been executed, and nothing more remains but to enforce the obligation against the party who has received the consideration,

(*r*) See Indian Succession Act, 1865, what will amount to special damage: s. 268, and Probate and Administration Act, 1881, s. 89. *Quirk v. Thomas* [1915] 1 K. B. 798.

(*t*) Opinion of Maule, J., given to the House of Lords in *Beckham v. Drake* (1849) 2 H. L. C. at p. 622; 81 R. R. 329. (*s*) *Chamberlain v. Williamson* (1814) 2 M. & S. 408; 15 R. R. 295; *Finlay v. Chirney* (1888) 20 Q. B. Div. 494; As to

the right to enforce it can be assigned, and can be put in suit by the assignee in his own name after notice. . . There is, however, another class of contracts where there are mutual obligations still to be enforced, and where it is impossible to say that the whole consideration has been executed. Contracts of this class cannot be assigned at all in the sense of discharging the original contractee and creating privity or quasi-privity with a substituted person. . . . To suits on these contracts, therefore, the original contractee must be a party whatever his rights as between him and his assignee. He cannot enforce the contract without showing ability on his part to perform the conditions performable by him under the contract. This is the reason why contracts involving special personal qualifications in the contractor are said, perhaps somewhat loosely, not to be assignable." Not that the burden of a contract can ever really be assigned, but sometimes it may be discharged by a delegated performance (in which case it does not matter to the promisee what are the exact relations of agency or otherwise between the promisor and his delegate), and sometimes not (u).

The Contract Act has no section dealing generally with assignability of contracts. A contract which, under section 40, is such that the promisor must perform it in person has been held not to be assignable. "When considerations connected with the person with whom a contract is made form a material element of the contract, it may well be that such a contract on that ground alone is one which could not be assigned without the promisor's consent, so as to entitle the assignee to sue him on it" (v). Thus where R. agreed with M., the proprietor of an indigo concern, to sow indigo taking the seed from M.'s concern on four biggahs of land out of his holding selected by M. or his Amlah, and, when the indigo was fit for weeding and reaping, to weed and reap it according to the instructions of the Amlah of the concern, and if any portion of the said land was in the judgment of the Amlah found bad, in lieu thereof to get some other land in his holding selected and measured by the Amlah, it was held that the contract was entered into with reference to the personal position, circumstances and qualifications of M. and his Amlah, and M. could not assign the

(u) *Tollurst v. Associated Cement Manufacturers* [1902] 2 K. B. 660, 668. (v) *Toomey v. Rama Sahi* (1890) 17 Cal. 115, at p. 121.
669, per Collins, M. R.

- §. 37. contract without the consent of R. (w). Similarly, where A., a salt manufacturer, agreed with B. to manufacture for him for a period of seven years such quantity of salt as B. required in consideration of B. paying him at a fixed rate, four months' credit after each delivery being allowed to B., and of his paying Government taxes and dues, and executing all but petty repairs in A.'s factory, it was held that the contract was based upon personal considerations, and that it was not therefore competent to B. to assign the contract without A.'s consent (x). After referring to the terms of the contract the Court said: "There is therefore not only credit given to [B.] in the matter of payment, but other liabilities are thrown upon him, the discharge of which depended upon his solvency, and there is also a certain discretion vested in him in regard to the quantity of salt to be demanded (y). You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract" (z). But where A. agreed to sell certain gunny bags to B. which were to be delivered in monthly instalments for a period of six months, and the contract contained certain buyer's options as to quality and packing, it was held that the clause as to buyers option did not preclude B. from assigning the contract (a). "There is nothing," it was said, "on the face of the contract to suggest that any credit was given by the defendant company to the original purchaser or that any circumstance of an especial or particular character existed which led to the making of the contract between the parties thereto" (b). See Specific Relief Act, s. 21 (b) and illustrations.

We next proceed to consider whether a contract for the future delivery of goods can be assigned under the Indian law; that is, if A. agrees to sell, say, rapeseed, cotton or gunny bags to B., deliverable at a future day, whether either party can assign the contract without the consent of the other, while the contract is still executory, so as to enable the assignee to maintain an action in his own right and in his

(w) *Ibid.*

(x) *Namasivaya Gurukkal v. Kadir Ammal* (1894) 17 Mad. 168.

(y) *Ibid.*, p. 174. The decision also proceeded on the ground that the contract was executory, and its assignment as such was invalid without A.'s consent (*ib.* p. 175).

(z) *Humble v. Hunter* (1848) 12 Q. B. 310, at p. 317; *Arkansas Smelting Co. v. Belden Co.*, 127 U. S. 379, 389.

(a) *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (1906) 33 Cal. 702, affirmed on appeal 34 Cal. 289.

(b) *Ibid.*, p. 707.

own name. In *Tod v. Lakhmidas* (c), decided in the year 1892, it was held by the High Court of Bombay that neither the seller nor the buyer of goods, where the goods are to be delivered at a future day, can assign the contract, before the date fixed for delivery, to a third person without the consent of the other so as to entitle the assignee to sue in his own name; but that there was no objection to a suit brought by the assignor and assignee as co-plaintiffs, for when the suit is by them both, there is no question as to which of them is to recover (d). The decision expressly proceeded upon the principle of the English law that where a contract is still executory the burden thereof cannot be assigned. The Court was not called upon to decide whether the interest of the seller or buyer in the contracts was assignable as an actionable claim within the meaning of the Transfer of Property Act: for that Act, though passed in the year 1882, was not extended to the Bombay Presidency until 1st January, 1893, and the case was heard and decided about eleven months before that date (e). An actionable claim is defined in s. 3 of that Act as a claim to any debt (except secured debts), or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, whether such debt or beneficial interest be existent, accruing, conditional, or contingent. An actionable claim can always be assigned, but the assignment, to be complete and effectual, must be effected by an instrument in writing; and upon the execution of such instrument all the rights and remedies of the assignor vest in the assignee, who may thereupon sue in his own name without making the assignor a party to the suit (f). As regards the interests of a *buyer* of goods in a contract for forward delivery, it has now been held by the High Court of Calcutta, in *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* (g), and by the High Court of Bombay, in *Hunsraj Morarji v. Nathoo Gangaram* (h), that such interest is an actionable claim within the meaning of the Transfer of Property Act, and may be assigned as such so as to enable the assignee

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(c) (1892) 16 Bom. 441.

of the Chief Court of Lower Burma.

(d) *Ibid.*; *Jiwon v. Haji Osman* (1903) 5 Bom. L. R. 373.

(f) Transfer of Property Act, 1882, s. 130, as amended by Act II of 1900.

(e) The Act is not yet extended to the Punjab, nor to British Burma, except the area included within the local limits of the ordinary civil jurisdiction

(g) (1906) 33 Cal. 702, affirmed on appeal in 34 Cal. 289.

(h) (1907) 9 Bom. L. R. 838.

- S. 37. to sue in his own name. In the former case *Sale, J.*, said : " The rule as regards the assignability of contracts in this country is that the benefit of a contract for the purchase of goods as distinguished from the liability thereunder may be assigned, understanding by the term *benefit* the beneficial right or interest of the party under the contract and the right to sue to recover the benefits created thereby. This rule is, however, subject to two qualifications : first, that the benefit sought to be assigned is not coupled to any liability or obligation that the assignor is bound to fulfil, and, next, that the contract is not one which has been induced by personal qualifications or considerations as regards the parties to it. Neither of these exceptions, I think, applies to the present case. There is nothing on the face of the contract to suggest that any credit was given by the defendant company to the original purchaser, or that any circumstance of an especial or personal character existed which led to the making of the contract between the parties thereto, nor, looking at the terms of the contract, does it appear to impose any liability or obligation of a personal character on the assignor which would prevent the operation of the rule of assignability. The contract is for the sale on the usual terms of a certain quantity of gunny bags to Cassim Karim, and subject to the exercise of certain options the purchaser has an absolute right to call for delivery of the goods on payment of the price. I am inclined to think that the right to claim the benefit of the contract, or, in other words, the right on certain conditions to call for delivery of the goods mentioned in the contract, constitutes a 'beneficial interest in moveable property, conditional or contingent,' within the meaning of the definition of an actionable claim in section 3 of the Transfer of Property Act, and as such is assignable." And in the *Bombay* case, where also the assignment was by the buyer, *Jenkins, C.J.*, said : " What was transferred was, in my opinion, property, and under section 6 of the Transfer of Property Act property of any kind may be transferred except as therein provided. None of the specified exceptions would have included what *Shariffbhoy* [buyer] purported to transfer, and I further hold that the subject of the transfer was an actionable claim, and so Chapter VIII of the Transfer of Property Act (i) applies. That this

(i) That is the Chapter of Transfers of Actionable Claims.

view of the Transfer of Property Act does not involve any material change in the law as previously understood in Bombay is apparent from what was said by Westropp, C.J., in *Dayabhai Dipchand v. Dullabhrum Dayaram* (j). In the last mentioned case, A. agreed to sell certain shares to B., deliverable at a future day. A., that is the seller, assigned the contract to C. (it does not appear exactly when or how), and C. sued B. for damages for refusing to take delivery. The District Judge, without examining the circumstances, held that such a contract was not assignable, but the case was remitted to him to determine upon all the facts. Westropp, C.J., said: "The District Judge should . . . have held that in equity it [contract] was assignable for a valuable consideration (Spence, Eq. Juris. 852) (k), subject, no doubt, (generally speaking), to the equities (if any) which may have existed between the defendant and the original vendor." It has yet to be decided whether the right of a seller to call for payment of the price of goods on delivery is an actionable claim and as such assignable. The dicta in *Jaffer Meher Ali v. Budge Budge Jute Mills Co.* are wide enough to include the seller's interest. But a claim for damages for breach of contract, after breach, is not an actionable claim "within the meaning of s. 3 of the Transfer of Property Act, but a mere right

(j) (1871) 8 B. II. C. 133.

(k) The passage referred to is as follows: "it has always been held in the Court of Chancery . . . that the assignment of a chose in action, founded on a valuable consideration, ought to be enforced. So the Court of Chancery has given effect to assignments of every kind of future and contingent interests and possibilities in real and personal property, if made for valuable consideration." This obviously relates to the transfer of rights and not to the delegation of duties. The statement itself is elementary. All that the case decides, in point of law, is that the District Judge was wrong in laying down as an unqualified proposition that the contract was not assignable. A. could not, of course, delegate his duty under

the contract to C. without B.'s consent. But he could perform the contract by C.'s agency and authorise C. to receive payment; or, when B.'s undertaking to pay for the shares had become a debt, he could assign the debt to C. The report fails to show which of these things he really did, but it is not strictly material to the decision of the High Court. It remains true, as Farran, J., most correctly said about twenty years later in the same Court, *Tod v. Lakshmidas*, 16 Bom. 441, 449, that "a purchaser is entitled to call upon the person with whom he contracted to fulfil his contract, and the latter cannot get rid of his liability by transferring it to a third person, but must himself perform the contract personally or vicariously."

Ss. 37, 38. to sue " within the meaning of s. 6, cl. (e), of that Act, and it cannot therefore be assigned (1).

Any other Law.—The most important statutory discharge of contracts, outside the present Act, is that which follows on insolvency. See the Presidency Towns Insolvency Act, 1909, and the Provincial Insolvency Act, 1907. See also ss. 62 to 67.

38.—Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Effect of refusal
to accept offer of
performance.

Every such offer must fulfil the following conditions:—

- (1) it must be unconditional :
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do :
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promises has the same legal consequences as an offer to all of them.

Illustration.

A. contracts to deliver to B. at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of performance with the effect stated in this section, A. must bring the cotton to B.'s warehouse, on the appointed day, under such circumstances that B. may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

Tender.—The subject-matter of the present section is to be found under the head of Tender in English books.

(1) *Abu Mahomed v. Chunder* (1909) *chandra* (1915) 38 *Mad.* 133, 140.
36 *Cal.* 345; *Varahaswami v. Rama-*

The first sub-section is chiefly, though not exclusively, appropriate to an offer of payment; the second and third concern offers of other kinds of performance, such as delivery of goods. S. 38.

The principles were laid down in England in 1843 in *Startup v. Macdonald* (m): "The law considers a party who has entered into a contract to deliver goods or pay money to another as having substantially performed it, if he has tendered the goods or money to the party to whom the delivery or payment was to be made, provided only that the tender has been made under such circumstances that the party to whom it has been made has had a reasonable opportunity of examining the goods or the money tendered, in order to ascertain that the thing tendered really was what it purported to be." As to what are proper time and place, see ss. 46—49, pp. 303; 305 below.

Offer must not be of part only.—With regard to the validity of an offer of performance, it must be not only unconditional, but entire: that is, it must be an offer of the whole payment or performance that is due (n). Words to this effect were in the corresponding clause in the original draft of the Act and it is not easy to see why they are not as prominent in the section as finally settled. The substance of the rule is, however, in force in British India. It is needless to consider whether this is because the Act does not expressly negative the English rule as already adopted, or because of the words "the whole of what he is bound by his promise to do" in sub-s. (2), or because an offer to pay or perform only in part is not really "an offer of performance" of an entire promise at all. Whatever the reason may be, it has been held by the High Court of Calcutta that a creditor is not bound to accept a sum smaller than he is entitled to, and therefore the tender of such a sum does not stop interest running on it (o).

In *Haji Abdul Rahman v. Haji Noor Mahomed* (p), in the High Court of Bombay, the defendant had tendered a sum which was only a small fraction of the whole sum claimed and found due, and one question in the case was whether interest was due, after the date of this offer, on the whole sum or only on the residue. Telang, J., thought that

(m) (1843) 5 Man. & G. 593, 610; 64 *Chunder Mookerjee* (1877) 3 Cal. 6, 16; R. R. 810, 824, judgment of Rolfe, B. *Chunder Caunt Mookerjee v. Jodoonath*

(n) *Dixon v. Clark* (1948) 5 C. B. 365. *Khan* (1878) 3 Cal. 468.

(o) *Watson & Co. v. Dhonendra* (p) (1891) 16 Bom. 141, 147—149.

8. 38. the rule in *Dixon v. Clark* (g), that a tender of part of an entire debt is bad, applied only to cases where the party making the tender admitted more to be due than was tendered, and that it had no application where the debtor tendered the amount as in full payment of the debt. The Court, however, decided against the defendant on the ground that the tender was ineffectual, as it had not been followed by a payment into Court in the suit, as required by an established rule of practice. This opinion of Telang, J., appears, with great respect, to be founded on a misconception both of the principle involved and of the English authorities. A creditor is not bound to accept less than is actually due and payable, and therefore by refusing to accept only a portion of the principal he cannot lose his right to interest on that portion where interest is otherwise payable. A so-called tender of less than the debtor admits to be due is not a tender at all, but an offer of payment on account, which the creditor may accept or not, and risks nothing, in point of law, by not accepting, though it is often, in point of fact, unwise not to take what one can get. Tender is, one may almost say, essentially the offer of a sum which the debtor asserts to be the whole sum due, but which is less than the creditor claims; for if the parties are agreed on the amount due, a formal offer is needless and useless. This being so the creditor refuses money at his peril in case his further claim turns out unfounded; but if he accepts, the debtor is still only offering what is due, and the creditor is not bound to make any admission in return. He may take the debtor's offered payment without prejudice to his claim, such as it may be, to a further balance. The debtor is entitled to a receipt for what he pays, but not to a release. It remains to be seen whether there was a discharge or only a payment on account. Hence a tender will be vitiated by the addition of any terms which amount to requiring the creditor to accept the sum offered in full satisfaction, or to admit in any other way that no more is due. It seems almost superfluous to add that an offer to pay an unascertained sum cannot be a tender (r).

Offer must be unconditional.—“The person making a tender has a right to exclude presumptions against himself by saying: ‘I pay this as the whole that is due’: but if he requires the other party to accept

(g) 5 C. B. 365; 16 L. J. C. P. 237.

Narainaswami Mudaliyar (1910) 34 Mad.

(r) See *Lal Bache Sahib v. Arcot* 320.

it as all that is due, that is imposing a condition ; and, when the offer is so made, the creditor may refuse to receive it as a tender " (s). §. 38.

A mere specifying of the account on which a payment is offered, though accompanied by such words as "in settlement" or the like, does not amount to a condition in this sense ; for it is no more than saying that the debtor offers all that he believes to be due (s). More than this, a debtor may tender, expressly under protest, a greater sum than he admits to be due, and thus reserve the right of taking further proceedings to test the justice of the claim. Such a protest does not impose any condition. "The creditor has only to say, 'I take the money', protest as much as you please,' and neither party makes any admission" (t). A tender of debt before the due date is not a valid tender, and will not prevent interest from running on the loan (u).

There are hardly any (v) recent English cases on tender of money debts, and the habits of modern business appear to have greatly diminished the importance of the subject (w).

Able and willing.—Sub-section (2) provides that the tender must be made under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do. A tender of money in payment must be made with an actual production of the money (x). But when the creditor is dead, and no probate has been

(s) *Bowen v. Owen* (1847) 11 Q. B. 130, 136, per Erle, J.; *Sati Prosad v. Monmohar Nath* (1913) 18 C. W. N. 84.

(t) *Scott v. Urbridge and Rickmansworth R. Co.* (1866) L. R. I. C. P. 536, 599, per Willes, J.

(u) *Eshahq Mulla v. Abdul Bari Haldar* (19 4) 31 Cal. 183.

(v) In *Rourke v. Robinson* [1911] 1 Ch. 480, the only question was whether a mortgagee was bound, on being paid off, to hand over a reconveyance as well as the title deeds, and the Court thought it needless to decide, but if necessary would have decided, that a tender of the full sum due, coupled with demand of something which the creditor is bound

by law to perform on being paid, is not conditional. See also *Pandurang v. Dadabhai* (1902) 26 Bom. 643.

(w) As to tender preventing an act of bankruptcy, see *Ex parte Danks* (1852) 2 D. M. & G. 936 ; 95 R. R. 376.

(x) A mere offer by post to pay the amount due is not a valid tender: *Veerayya v. Sivayya* (1914) 27 Mad. L. J. 482. Similarly, where a contract is to be performed by the execution and delivery of a document, a mere offer by post to execute the document without having the document ready to be delivered is not a valid tender: *Subapathy v. Vamalakalinga* (1915) 38 Mad. 950, 970. Such points are quite elementary.

8. 38. obtained by the executors of the deceased, an offer by letter to pay the debt, on a proper release being executed, is a valid tender, provided the debtor was able to pay the debt, and had money available for that purpose. No actual production of money is necessary in such a case, there being no person entitled in law to receive the payment. The rule that nothing but actual tender will stop interest applies only in those cases where there has been some one to whom interest could be tendered either as the creditor himself or one who had established his right to be the representative of a deceased person (*y*). A plea of tender before action must be accompanied by a payment into Court after action, otherwise the tender is ineffectual (*z*). The following is the form of the plea of tender: "As to the whole (*or* as to Rs. . . . , part of the money claimed) the defendant made tender before suit of Rs. . . . , and has paid the sum into Court." See Code of Civil Procedure, 1908, O. 24, rr. 1-3, and Schedule I, Appendix A, "Written Statements," Form No. 4.

Where a contract for the purchase and sale of Government paper provides for the delivery of the paper to the defendant, it is not necessary that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an actual tender of it. If the plaintiff was ready and willing to perform his part of the contract and did his best to inform the defendant by going to his place of business that he was so, that would be sufficient, in the absence of evidence to the contrary, to constitute readiness and willingness (*a*). Where a contract is made for the future delivery of shares, and the purchaser, before the delivery day, gives notice to the vendor that he will not accept the shares, the vendor is thereby exonerated from giving proof of his readiness and willingness to deliver the shares, and the issue as to readiness and willingness is in such a case immaterial (*b*). Where the plaintiff agreed to manufacture chairs for a railway company, and after parts

(*y*) *Pandurang v. Dadabhoy* (1902) 26 Dyal (1883) 9 Cal. 791.

Bom. 643, at pp. 647-648.

(*b*) *Dayabhai Dipchand v. Maniklal*

(*z*) *Haji Abdul Rahman v. Haji Noor Vrijbhukan* (1871) 8 B. H. C. A. C. Mahomed (1891) 16 Bom. 141, at pp. 123. See also *Dayabhai Dipchand v. 149-150; Sahapathy v. Vanmahalinga Dullabhrum Dayaram* (1871) 8 B. H. C. (1915) 38 Mad. 959, at p. 970. A. C. 133.

(*a*) *Juggernath Sew Bux v. Ram*

had been delivered the company gave orders to the plaintiff not to make and send any more, it was held that the plaintiff was entitled to recover without actually making and tendering the remainder of the goods (c). As to repudiation of a contract by one party before the time for performance, see farther on, s. 39, p. 277 below. See also notes to s. 51, "Readiness and willingness."

Tender of instalments.—A lender is entitled to decline, in the absence of any agreement as to repayment of the loan, to receive payment of the sum due to him in instalments, and he can claim that the whole sum due be paid at one and the same time (d). But when payment of money or delivery of goods in instalments is provided for by the contract, a tender of instalments is a good tender. In a case which arose in Calcutta, a contract made between the plaintiff and the defendant stipulated for delivery to the defendant of 7,500 hags of Madras coast castor seed, which were to be shipped per "steamers," and then stated that shipment of 2,500 hags was to be made in December. Of these, 1,690 bags arrived on 12th December, and the plaintiff offered delivery thereof to the defendant, who refused to take them on the ground that he was not bound to take less than the whole of the 2,500 bags at one time. The bags were thereupon resold by the plaintiff. The remaining 810 hags, being the balance of the December shipment, arrived on 19th December, but were refused by the defendant on the same ground as before, and those also were accordingly resold by the plaintiff. The plaintiff sued the defendant for damages for breach of the contract in not accepting the bags. The Court held without difficulty that there was a legal and proper tender of the December shipment by the plaintiff according to the terms of the contract (c).

Reasonable opportunity.—A tender of goods must be so made that the person to whom the goods are offered has a reasonable time to ascertain that the goods offered are goods of the quality contracted for. A tender made at such a late hour of the appointed day

(c) *Cort v. Ambergate Railway Company*, 17 Q. B. 127. The measure of damages in such a case would ordinarily be the difference between the cost of production and delivery and the contract price.

(d) *Behari Lal v. Ram Ghulam* (1902) 24 All. 461.

(e) *Simson v. Gora Chand Doss* (1883) 9 Cal. 473. *Brandt v. Lawrence* (1876) 1 Q. B. Div. 344, which the Court cited and followed, was a similar case.

8. 38. that the buyer has not time to inspect them is not good (*f*). In a Bombay case (*e*) the defendant agreed to purchase from the plaintiff 100 bales "fully good fair Kishli cotton," to be delivered from 15th March to 1st April, 1881. On 30th March the plaintiffs sent the defendant a letter enclosing a sampling order, which was received by the defendant's agent at 11-30 a.m. that day. The defendant got samples taken of the cotton, and a dispute having arisen as to the quality and classification of the cotton, the plaintiffs wrote to the defendant on 31st March asking him to attend with his surveyor at 1 p.m. on that day to survey the cotton, as otherwise an *ex parte* survey would be held. It being a mail day, the defendant's surveyor could not attend at the appointed hour, and the plaintiffs had an *ex parte* survey held by their own surveyors, and they pronounced the cotton to be of the description contracted for. Shortly afterwards the defendant asked for a survey by a letter which reached the plaintiffs at 2-19 p.m. on that day. The plaintiffs did not comply with the application, and called upon the defendant to take delivery of the goods. In a suit by the plaintiffs for damages for breach of the contract it was contended for the defendant that no reasonable opportunity was afforded to the defendant to examine the goods, as there was no joint survey, and that the time allowed by the plaintiffs for the examination of the cotton was not sufficient. It was held that the defendant had reasonable opportunity within the meaning of this section. Latham, J., said: "The rule in the 38th section of the Contract Act agrees with the rule of English law laid down in Benjamin on Sales (2nd ed. pp. 573 and 576) (*h*); but there is little authority as to what is a reasonable opportunity of inspection (*i*). . . . In the present case the sampling order was delivered to the defendant by 11-30 a.m. on the 30th March, and he had till 1 p.m. on the 31st March before any refusal by the plaintiffs to allow a further examination

(*f*) *Startup v. Macdonald* (1843) 5 Man. L. C. 593, 64 R. R. 810.

(*g*) *Ruttonsey v. Jamnadas* (1882) 6 Bom. 692.

(*h*) 696, 704, 4th ed.

(*i*) *Ishericood v. Whitmore* (1843) 11 M. & W. 347; 63 R. R. 624, seems to be the only case in point. "A tender of goods does not mean a delivery or

offer of packages containing them, but an offer of those packages under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained": per Parke, B.

is alleged. Now Vizbhookands Atmaram seems to have been S. 31 certainly dilatory in his examination, he not having compared the samples with the standards till past noon on the 31st; and it seems to me that a period of over twenty-four hours gave a reasonable opportunity to see whether the cotton offered was the cotton which the plaintiffs were bound by their contract to deliver.

"Then are we to go further and to say that the purchaser is entitled to continue inspecting and examining until the expiration of the period for delivery? I find no authority for this, and in many cases it would be unreasonable to place no limit on the inspection. Is a purchaser at liberty to open and taste every bottle of wine in a lot sold, or in the present case to pass every pound of cotton through an expert's hands? There must be some limit, and I think that a reasonable opportunity is the limit alike for vendor and purchaser, and that such a reasonable opportunity had been had by 1 p.m. on the 31st March."

Tender of money.—A creditor is not bound to accept a cheque; but if a cheque is tendered and received, and the creditor or his agent objects only to the amount, or makes no immediate objection at all, he cannot afterwards object to the nature of the tender.

The landlord of a house, through his agent, sent in rent-bills to his lessee. The lessee gave the agent a cheque in favour of her attorney for the amount demanded, and obtained a receipt from him. The landlord's agent then took the cheque to the lessee's attorney, who cashed it and handed the amount to the agent, and requested him to get the rent-bills receipted and returned to him. The landlord's solicitor, to whom the money was taken, refused to accept it, and the money was then returned to the lessee's attorney. In a suit by the landlord for the rent, it was held that under the circumstances the tender amounted to payment, and the suit was dismissed with costs (j).

Legal Tender.—The money tendered must be current coin of the country. As to tender of coinage, see the Indian Coinage Act III. of 1906, ss. 11 to 15; and as to tender of currency notes, see the Paper Currency Act II. of 1910, s. 15.

Where a loan to a mortgagor was made of Rs. 450 in the Poona currency which is equivalent to Rs. 435-2-0 of the British currency

(j) *Bolye Chund Sing v. Moulard* (1840) 59 R. K. 833; 8 Dowl. Pr. Cs. 442, (1873) 4 Cal. 572. *Cp. Jones v. Arthur*

8. 38. the mortgagee cannot claim Rs. 450 in the British currency, and the mortgagor is entitled to redeem on payment of Rs. 435-2-0 in the British currency (*k*).

Offer to one of several joint promisees.—A tender of rent by a lessee to one of several joint lessors (*l*) and of a mortgage debt by a mortgagor to one of several mortgagees (*m*) would be a valid tender under this section.

Validity of discharge by one of several joint promisees.—In *Barber Maran v. Ramana* (*n*), it was held by the High Court of Madras that this section does not make it incumbent on the debtor to satisfy all the joint promisees before obtaining a complete discharge, and therefore a release of a mortgagor by one of two mortgagees on payment to him of the mortgage debt discharges the mortgagor as against the other mortgagee. This decision was based upon the English case of *Wallace v. Kelsall* (*o*), decided about thirty-two years before the Contract Act, and upon the last paragraph of s. 38, which provides that “an offer to one of several joint promisees has the same legal consequences as an offer to all of them.” The correctness of this decision was doubted by the same Court in subsequent cases (*p*), and it was also doubted by the High Courts of Bombay (*q*) and Calcutta (*r*). One reason for the doubt was the decision of Farwell, J., in *Powell v. Brodhurst* (*s*), which has considerably shaken

(*k*) *Trimbak v. Sakharam* (1891) 16 Bom. 599.

(*l*) *Krishnarav v. Manaji* (1874) 11 B. H. C. 106, where it was held that payment of rent by a lessee to one of several joint lessors discharges the debt as to all. But payment to a partner in fraud of his co-partners is not a valid discharge: *Chinnaramanuja Ayyangar v. Padmanabha Pillaiyan* (1896) 19 Mad. 471.

(*m*) See *Barber Maran v. Ramana Goundan* (1897) 20 Mad. 461, where it was held, relying upon this section principally, that payment of the amount due on a mortgage by a mortgagor to one of several mortgagees discharges the mortgage debt as to all.

(*n*) (1897) 20 Mad. 461. See *Shrinivasdas v. Meherbar* (1917) 41 Bom. 300,

L. R. 44 I. A. 36, where the question was one of title to immoveable property.

(*o*) (1840) 7 M. & W. 264; 56 R. R. 707.

(*p*) *Ahinsa Bibi v. Abdul Kader* (1901) 25 Mad. 26, at pp. 38-39; *Ramasamy v. Munnigandi* (1910) 20 Mad. L. J. 769; *Saeik Ibrahim v. Rama Aiyar* (1911) 35 Mad. 685, 687.

(*q*) *Silarav v. Shridhar* (1903) 27 Bom. 292, 294.

(*r*) *Jagat Tarini v. Naba Gopal* (1907) 34 Cal. 305, at pp. 320-321; *Hossainara v. Ralinannessa* (1910) 38 Cal. 342, at pp. 349-350.

(*s*) [1901] 2 Ch. 160.

the authority of *Wallace v. Kelsall*. Lately (t), however, a Full Bench of the Madras High Court (White, C.J., dissenting), approved of the decision in *Barber Maran v. Ramana*, and held that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees (u). It was observed that there was no distinction as regards the question of discharge between claims under a mortgage bond and those under a negotiable instrument. Referring to the last paragraph of s. 38, Sankaran Nair, J., said: "It is difficult to impute an intention to the Legislature that the promisor was entitled to make the offer though the promisee was not entitled to accept it. It seems clear that if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held to be liable to pay over again to the other promisees what he has already paid. The payment therefore must be treated as a complete discharge" (v). As to *Wallace v. Kelsall*, Sadasiva Ayyar, J., said that it was decided in 1840 and was good law when the Indian Contract Act was passed in 1872, that Act following the principles of the English decision. On the other hand, White, C.J., in delivering his dissenting judgment said: "It (s. 38) provides in effect that all the joint promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender, to one of them. The section does not deal with the legal consequences of an accepted tender, or of an accepted offer of performance, but with the legal consequences where a tender or offer has been made and the tender or offer has not been accepted. No doubt the last paragraph of the section is general and not restricted to an offer which has not been accepted, but apparently the Legislature was not contemplating the legal consequences of an offer which had been accepted but the legal consequences of an offer which had been refused. I do not think we can infer from this enactment that the Legislature intended to lay down by implication the acceptance of payment by one of several promisors operated as a discharge of the claims of the others. On the other hand, as it seems to me now, s. 45 which deals with the devolution of rights where a

(t) *Annapurnaamma v. Akkaya* (1913) 1831, ss. 78 and 82.

36 Mad. 544.

(v) 36 Mad. at p. 549.

(u) See Negotiable Instruments Act,

8. 38. person has made a promise to two or more persons "jointly" throws very little, if any, light on the question which we have to decide. If we are unable to find an answer to the question within the four corners of the Contract Act, we have to look to the general law and to see whether the rule of law as laid down in *Wallace v. Kelsall* applies or whether the rule or rather the presumption of equity on which *Steeds v. Steeds* (w) was decided is to prevail. I think the equitable presumption applies and I do not think this presumption is negatived by the provisions of the Contract Act" (x). The view taken by White, C.J., was adopted by a Full Bench of the Chief Court of the Punjab (y). The view taken by the Patna High Court accords with the judgment of the majority of the Full Bench (z).

We agree with the dissenting opinion of White, C.J., so far as concerns the present section. Tender of a money debt does not discharge the debt (a point surely not irrelevant); the material section of the Contract Act, as regards the right to give a discharge in the name of joint debtors, is not s. 38 but s. 45. It must not be overlooked that in English law the rule that payment to one of joint creditors is a good discharge is still the general rule (a).

In any case a payment to one of several joint creditors does not operate as a payment to them all where the payment is fraudulently made to him and not for the benefit of them all (b).

The principle of the decision in *Barber Maran v. Ramana* applies only where there are two or more joint promisees. It does not apply to the case of co-heirs who are not joint promisees, but the heirs of a single promisee, and a release therefore of the debtor by one of the heirs of the deceased creditor on payment to him of the amount due on the bond is not a valid discharge to the debtor (c). Nor does that principle apply when a debt, though due to a joint Hindu family, stands in the name of one member. In such a case he is the

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| (w) (1899) 22 Q. B. D. 537. | debt is really joint. |
| (r) 36 Mad. at pp. 545-546. | (b) <i>Sheik Ibrahim v. Rama Aiyar</i> |
| (y) <i>Mathra Das v. Nizam Din</i> (1917) | (1911) 35 Mad. 685. |
| Panj. Rec., no. 68, p. 252. | (c) <i>Ahinsa Bibi v. Abdul Kader</i> |
| (z) <i>Parbha Ram v. Jhalo Kuer</i> (1917) | (1901) 25 Mad. 26; <i>Sikaram v. Shridhar</i> |
| 2 Pat. L. J. 520. | (1903) 27 Bom. 292; <i>Ramasamy v.</i> |
| (a) <i>Powell v. Brodhurst</i> [1901] 2 | <i>Muniyandi</i> (1910) 20 Mad. L. J. 709, at |
| Ch. at p. 161: the question that matters, | pp. 715-716; <i>Antalamma v. Bellam</i> |
| as there pointed out, is whether the | <i>Chenchayya</i> (1918) 34 Mad. L. J. 315. |

person *prima facie* entitled to realize it, and a payment made to him is a valid discharge of the debt; if the payment is made to any other member of the family, it does not operate as a discharge unless there be circumstances justifying the payment (d). Where a bond is passed to the manager of a joint Hindu family, payment made to a junior member of the family during the lifetime of the manager does not discharge the promisor from his liability under the bond (e).

39.—When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Effect of refusal
of party to perform
promise wholly.

Illustrations.

(a) A., a singer, enters into a contract with B., the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B. engages to pay her 100 rupees for each night's performance. On the sixth night A. wilfully absents herself from the theatre. B. is at liberty to put an end to the contract.

(b) A., a singer, enters into a contract with B., the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B. engages to pay her at the rate of 100 rupees for each night. On the sixth night A. wilfully absents herself. With the assent of B., A. sings on the seventh night. B. has signified his acquiescence in the continuance of the contract, and cannot now put an end to it, but is entitled to compensation for the damage sustained by him through A.'s failure to sing on the sixth night.

Refusal to perform contract.—It is not easy to see why this section is placed here. The subject-matter would seem really to belong to the category of contracts, not which must, but which need not, be performed, dealt with in ss. 62-67, pp. 341, 372 below. Further, it is closely connected with the consequences of breach of contract laid down in Chap VI. However, a commentator must take the Act as he finds it.

As correctly laid down in the High Court of Calcutta when the Act was still recent, "this section only means to enact what was the

(d) *Ramasami Chelli v. Manikka* Mad. 326.

Mudali (1899) 9 Mad. L. J. 155; *Adaik-*

(e) *Ankalumma v. Chenchayya*
kalam Chelli v. Marimuthu (1899) 22 (1918) 41 Mad. 637.

- S. 39. law in England and the law here before the Act was passed, viz., that where a party to a contract refuses altogether to perform or is disabled from performing his part of it the other side has a right to rescind it" (f). English authorities are collected in the notes to *Cutter v. Powell* in Smith's Leading Cases (g).

The words used by Garth, C.J., "where a party to a contract refuses altogether to perform. . . his part of it," clear up a slight verbal ambiguity in the Act, where the words "his promise in its entirety" mean the substance of the promise taken as a whole. In one sense, refusal to perform any part of a contract, however small, is a refusal to perform the contract "in its entirety"; but the kind of refusal contemplated by this enactment is one which affects a vital part of the contract, and prevents the promisee from getting in substance what he bargained for.

The clearest leading case is perhaps *Withers v. Reynolds* (h). The action was for not delivering straw to the plaintiff under an agreement whereby the defendant was to supply the plaintiff with straw from October, 1829, to Midsummer, 1830, in specified quantities, and the plaintiff was to pay a named sum per load "for each load of straw so delivered," which the Court read as meaning that he was to pay for each load on delivery. In January, 1830, the straw having been regularly sent in, and the plaintiff being in arrear with his payments, "the defendant called upon him for the amount, and he thereupon tendered to the defendant £11 11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand." The defendant took this payment under protest, and refused to deliver any more straw unless it was paid for on delivery. The Court held that this gave the plaintiff no right of action, in other words that the defendant was entitled to put an end to the contract. As Parke, J. (as he was then, afterwards better known as Baron Parke), said, "the substance of the agreement was that the straw should be paid for on delivery. . . . When, therefore, the plaintiff said that he would not pay on delivery (as he did, in substance, when he insisted

(f) Per Garth, C.J., in *Sootan Chund v. Schiller* (1878) 4 Cal. 252, 255, without some familiarity with the old common law system of pleading.

(g) Vol. ii. at p. 9, 11th ed. This note, however, is hardly intelligible (h) (1831) 2 B. & Ad. 882; 36 R. R. 782; Finch, Sel. Ca. 712.

keeping one load in hand), the defendant was not obliged to go on supplying him." It is to be observed that, as Patteson, J., added, "if the plaintiff had merely failed to pay for any particular load, that of itself might not have been an excuse to the defendant for delivering no more straw." Later English authorities have in fact established that mere failure to make one of a series of payments will not generally, in the absence of a prospective refusal, discharge the other party from proceeding with the contract (i).

As to failure in performing other particular terms of a contract, no positive general rule can be laid down as to its effect. The question is in every case whether the conduct of the party in default is such as to amount to an abandonment of the contract or a refusal to perform it, or, having regard to the circumstances and the nature of the transaction, to "evinced an intention not to be bound by the contract" (j). It seems, however, with great submission, that the intention which is material is not that with which the contract is broken, but that with which it was made. Parties can undoubtedly make any term essential or non-essential; they can provide that failure to perform it shall discharge the other party from any further duty of performance on his part, or shall not so discharge him, but shall only entitle him to compensation in damages for the particular breach. Omission to make the intention clear in this respect is the cause of the difficulties, often considerable, which the Courts have to overcome in this class of cases.

In *Sooltan Chund v. Schüller* (k) the defendants agreed to deliver to the plaintiffs 200 tons of linseed at a certain price in April and May, the terms as to payment being cash on delivery. Certain deliveries were made by the defendants between the 1st and 8th of May, and a sum of Rs. 1,000 was paid on account by the plaintiffs, which left a large

(i) *Freeth v. Burr* (1874) L. R. 9 C. P. 208; *Finch, Sel. Ca.* 714; *Mersey Steel and Iron Co. v. Naylor, Benson & Co.* (1884) 9 App. Ca. 434. "These cases were determined after the passing of the Indian Contract Act, but the views of the learned judges are useful guidea in determining what amounts to a 'refusal' in cases of this class": per Maclean, C.J., in *Rash Behary Shaha v.*

(j) *Nrittya Gopal Nundy* (1906) 33 Cal. 477, at p. 481. (k) L. R. 9 C. P. 213, 214; and see *Pallock on Contract*, 280 sqq.

(k) (1878) 4 Cal. 252; *Simson v. Virayya* (1886) 9 Mad. 359; *Volkart Bros. v. Ratna Velu Chetti* (1894) 18 Mad. 63; *Sundar Singh v. Krishna Mills Co., Ltd.* (1914) Punj. Rec. no. 63, p. 214.

§. 39. balance due to the defendants in respect of linseed already delivered. This balance was not paid and the defendants thereupon wrote to the plaintiffs cancelling the contract and refusing to make further deliveries under it. The plaintiffs answered expressing their willingness to pay on adjustment of a sum which they claimed for excess refraction and an allowance for some empty bags. The defendants stated that they would make no further delivery, and the plaintiffs thereupon bought in other linseed and sued the defendants for damages for non-delivery of the remaining linseed. Upon these facts it was held, following *Freeth v. Burr* (l), that there was no refusal on the part of the plaintiffs to pay for the linseed delivered to them, as they were willing to pay the sum due as soon as their cross-claims were adjusted. As to illustration (b) to the section it was said: "That illustration is perhaps not a happy one, because it may lead, as I think it has led in this instance, to misapprehension. But the difference between that case and this is clear enough. The singer by wilfully absenting herself, though on one night only, did in fact refuse altogether to perform an integral and essential part of her contract. By doing so she put it out of her power to perform her contract in its entirety. But here the plaintiffs have never refused to perform any part of their contract. They were willing to pay the sum due as soon as their cross claims were adjusted; and their default consisted in not paying for the linseed on delivery" (m).

It may be further observed, with regard to the illustrations, that it would be rash to extend them. In England it has been held that a singer engaged to perform in concerts as well as in operas who has agreed, amongst other things, to be in London six days before the beginning of his engagement, for the purpose of rehearsals, does not, merely by failing to be in London at the time so named, entitle the manager to put an end to the contract (n). Wrongful dismissal of an employee has, on the other hand, been held to determine not only the contract of service, but a term restraining the employee from carrying on the same business after its termination (o). In reading the illustrations to the Act, so far as they bear on questions of

(l) L. R. 9 C. P. 208.

183; Finch, Sel. Ca. 742.

(m) Per Garth, C.J., 4 Cal. at p. 256.

(o) *General Billposting Co. v. Atkin-*

(n) *Bellini v. Gye* (1876) 1 Q. B. D. 508 [1909] A. C. 118.

construction, it must be assumed that there are not any terms beyond those stated; the agreements met with in practice will almost always contain special terms, which must be considered. 8.

The principles set forth above were recently applied by the High Court of Calcutta in a case where the plaintiff had agreed to purchase from the defendant 300 tons of sugar, "the shipment [to] be made during September and October next in lots of about 75 tons in a shipment," the terms as to payment being cash before delivery. Notice of the arrival of the September shipment was given to the plaintiff, and he was called upon to pay before delivery. The plaintiff was unable to pay, and asked for time, but the defendant would not give it, and ultimately wrote to the plaintiff stating that he had cancelled the contract. On the arrival of the October shipment the plaintiff tendered payment for the same, but the defendant refused to accept the money, saying that the contract had been cancelled. The plaintiff thereupon sued the defendant for damages for refusing to deliver the October shipment. It was held in accordance with the English authorities that mere failure on the part of the plaintiff to pay for and take delivery of the September shipment did not amount to "a refusal" to perform the contract within the meaning of this section so as to entitle the defendant to rescind the contract, and that it did not exonerate him from delivering the October shipment (*p*).

"Disabled himself from performing."—Disability due to the party's own fault must be distinguished from inability to perform a contract. See Specific Relief Act, s. 14, as to the effect of inability of a party to perform the whole of his part of a contract. See also s. 24 of the same Act, which enacts amongst other things, that specific performance of a contract cannot be enforced in favour of a person who has become "incapable" of performing any essential term of a contract that on his part remains to be performed.

It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived, it is equivalent to a breach (*q*). In a modern English case (*r*) the

(*p*) *Rash Behary Shaha v. Nrittya Gopal Nundy* (1906) 33 Cal. 477.

452; Anson, 349, 14th ed.

(*r*) *Synge v. Synge* [1894] 1 Q. B.

(*g*) See 3 Encycl. Laws of England, 350 (548, 2nd ed.); Pollock on contract,

466 C. A.

8. 39. defendant promised the plaintiff, his intended wife, in consideration of the marriage which afterwards took place, to leave a certain house and land to her by will for her life. After the marriage he sold the property to a third person. The Court, having decided on the facts that there was a contract, held that the plaintiff was entitled to treat the defendant's conveyance to a stranger as an immediate breach and to sue for damages.

In a Madras case, under the terms of a mortgage for Rs. 800, the mortgagee advanced Rs. 300 to the mortgagor and agreed to pay the balance to a prior mortgagee of the same property. The mortgagee failed to pay the balance according to the agreement, and the prior mortgagee sued the mortgagor and recovered the debt by attachment and sale of the mortgagor's moveable property. About eight years after the date of the mortgage the mortgagee sued the mortgagor for interest due under the mortgage on Rs. 300 only. It was held (s) that under the circumstances the mortgagor was entitled to rescind the mortgage under this section "on the ground that the mortgagee by acting in contravention of his agreement incapacitated himself from performing it in its entirety" (t), and that he was not entitled to treat the original mortgage as still in force so as to enable him to sue for the interest alone. The Court, however, expressed the opinion that in putting an end to the mortgage the mortgagor was bound to give up the benefit he had received under the mortgage and to pay back Rs. 300 with interest up to date of cancellation (u). Without disputing the correctness or the substantial justice of the decision, one may be allowed to think that the application of the present section was somewhat forced. It was made by only one member of the Court.

The view that a mortgagor who has not received the full amount of the consideration for the mortgage is entitled to rescind the mortgage under this section was approved of by the High Court of Madras in a later case (v), but it has been dissented from by the High Courts of Allahabad (w) and Patna (x), the latter courts holding that the present section applies to contracts only, that a mortgage when regis-

(s) *Subba Rau v. Devu Shetti* (1894) 18 Mad. 126. (1912) 35 Mad. 114, at p. 117.
 (t) Per Muttusami Ayyar, J., at p. 127. (w) *Rashik Lal v. Ram Narain* (1912) 34 All. 273.
 (x) *Makhan Lal v. Hanuman Dux* (1917) 2 Pat. L. J. 168.
 (v) See s. 65, p. 363 *post*.
 (w) *Rajai Tirumal v. Pandla Muthial*

tered is not a contract but a transfer of property (y), and that a mortgage, notwithstanding a partial failure of consideration, may be enforced to the extent of money actually advanced by the mortgagee to the mortgagor (z). S. 31

“Promisee may put an end to the contract.”—The common law rights of a promisee on refusal by the promisor to perform his promise were thus stated by Scotland, C.J., in a Madras case (a) decided in 1863 and the statement remains applicable under the Act:—

“If a vendor contract to deliver goods within a reasonable time, payment to be made on delivery, and before the lapse of that time, before the contract becomes absolute, he says to the purchaser, ‘I will not deliver the goods,’ the latter is not thereby immediately bound to treat the contract as broken, and bring his action. The contract is not necessarily broken by the notice. That notice is, as respects the right to enforce the contract, a perfect nullity, a mere expression of intention to break the contract, capable of being retracted until the expiration of the time for delivering the goods. It cannot be regarded as giving an immediate right of action, unless, of course, the purchaser thereupon exercises his option to treat the contract as rescinded, when he may go into the market and supply himself with similar goods, and sue upon the contract at once for any damage then sustained. The law on this subject will be found in *Leigh v. Paterson* (b) and *Phillpotts v. Evans* (c), the authority of which cases was upheld in *Hochster v. De la Tour*” (d).

(y) See Transfer of Property Act, 1882, s. 58.

(z) It has been held by a Full Bench of the Punjab Chief Court that an agreement to mortgage is indivisible, and that failure of a part of the consideration leads to failure of the whole mortgage: *Gokulchand v. Rahaman* (1907) Punj. Rec. no. 59. But see *contra*: *Motichand v. Sagan* (1905) 29 Bom. 46; *Bhagabati v. Narayan* (1907) 31 Bom. 552; *Rajani Kanta Das v. Gour Kishore* (1904) 35 Cal. 1051; *Tatia v. Babaji* (1898) 22 Bom. 178, at p. 183.

(a) *Mansuk Das v. Rangayya Chetti*, 1 M. H. C. 162.

(b) 8 Taunt. 540.

(c) 5 M. & W. 475; 32 R. R. 802. It is difficult to understand how the learned Chief Justice supposed this case to anticipate the doctrine of *Hochster v. De la Tour*, to which the judgment of Parke, B., is distinctly adverse; but this is of only historical interest.

(d) 2 E. & B. 678; 95 R. R. 747; and see *Ripley v. McClure* (1849) 4 Ex. 345, 359; 80 R. R. 593, 604. The

39. The last-mentioned case is now generally treated as the leading one on "anticipatory breach of contract" (e). The rule shortly indicated by this phrase is that on the promisor's repudiation of the contract, even before the time for performance has arrived, the promisee may at his option treat the repudiation as an immediate breach putting an end to the contract for the future and giving the promisee a right of action for damages. It must be remembered that the option is entirely with the promisee.

A few months before the Contract Act came into force the effects of "anticipatory breach" were thus summed up in the Exchequer Chamber in England (f):—

"The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." See notes to illustration (h) to section 73.

rule in *Hochster v. De la Tour* is now Cp. per Lord Haldane at p. 33.

generally received in America, and (f) *Frost v. Knight* (1872) L. R. 7
has been approved and applied by the Ex. 111. The judgment delivered by
Supreme Court of the United States: Cockburn, C.J., is practically, though
Roehm v. Horst (1900) 178 U. S. 1. not formally, the judgment of the

(e) This expression is considered Court; see at p. 118. The actual points
unfortunate by Lord Wrenbury, *Bradley* decided were that the rule applies to
v. H. Newsom, &c. [1919] A. C. 16, 53; contingent promises, and that the con-
the breach is in the present repudiation. tract to marry is not excepted from it

It may be worth while to add that an unsuccessful attempt to perform a contract which does not disable the promisor from still performing it effectually within the time limited, or a reasonable time, and does not cause any damage to the promisee, cannot be treated as a refusal. Such an attempt does not of itself affect the legal rights of the parties at all (g).

The election of the plaintiff to treat repudiation of the contract as an immediate breach does not affect the measure of damages (see commentaries on s. 120, below).

These authorities have been more lately followed in British India. Where, according to the custom of the caste to which the plaintiff and the defendant belonged, marriages ordinarily took place when the bride was between twelve and fifteen years of age, and the plaintiff, who was betrothed to the defendant's daughter, required the defendant to fix a date for his marriage within a certain period, after which the marriage could not take place for eighteen months, owing to the intervention of the *Sinhasth* year, and the girl would then have passed her fifteenth year, it was held that the declaration by the girl that she was unwilling to be married for three or four years, and by the father that he could not compel her to change her mind, was practically a repudiation of the contract of marriage, and entitled the plaintiff to damages for the breach (h).

Contract of service.—The illustrations to the section are both examples of contracts of service. In *Hochster v. De la Tour* (i) the defendant engaged the plaintiff as his courier on a Continental tour from June 1 for three months certain at £10 a month. Before that day came the defendant changed his mind and wrote to the plaintiff that he did not want him. The plaintiff, without waiting further and before June 1, sued the defendant for breach of contract. For the defendant it was argued that the plaintiff should have waited till

on any such grounds of its special character as were suggested in the Court below. See also *Synge v. Synge* (note (r), p. 281 above), where, however, it was not necessary to rely on the principle to its full extent.

(g) See *Borrowman v. Free* (1878) 4 Q. B. Div. 500.

(h) *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* (1897) 21 Bom. 23, 35. For the form of the decree in such cases see *ib.* p. 37, following *Umel Kika v. Nagindas* (1870) 7 B. H. C. 122.

(i) (1853) 2 E. & B. 678; 95 R. R. 747.

8. 39. June 1 before bringing his action, on the ground that the contract could not be considered to be broken till then. It was held, however, that the contract had been broken by express renunciation, and the plaintiff was not bound to wait until the day of performance. The principles enunciated in this case and the others underlying the present section were applied by the High Court of Bombay in a case where a station-master in the employ of a railway company, alleging that he had resigned the service of the company, claimed his share of the company's provident fund, but the claim was resisted by the company on the ground that he was dismissed from service, and that he was not therefore entitled, under the rules of the fund, to more than the amount of his subscriptions thereto. One of the questions was whether the notice of dismissal, having regard to the date on which it was given, operated as a dismissal of the plaintiff. The plaintiff had on February 14 gone on three months' leave without pay. On May 5 he tendered his resignation to the defendant company. On May 13 the company wrote to the defendant that he was dismissed from service. It was contended that there was no such dismissal as disentitled the plaintiff to his full share of the fund, first, because he had previously tendered his resignation, and, secondly, because the notice of dismissal was given on May 13, that is, before he became liable to resume his duties, which was on the 14th. Both these contentions were overruled. As to the first contention it was said that, there being no contract between the parties the service should terminate on resignation, the resignation did not operate to determine the contract unless it was assented to by the other side. As to the other contention it was said: "His (plaintiff's) letter of the 5th day of May was an intimation of his intention not to perform the services to which he was bound. . . . The company only took him at his word . . . and it seems to me that there was on the 13th an *anticipatory breach* which in the events entitled them to determine the contract by dismissing the plaintiff" (j).

Where a servant or a clerk who is engaged by the month leaves his employer's service wrongfully in the course of the then current

(j) *Ganesh Ramchandra v. G. I. P. Ry. Co.* (1900) 2 Bom. L. R. 790. This appears a strange decision, for if the resignation was inoperative there was no breach at all. There might have been if the plaintiff had said "I shall not return to your service, whether you accept my resignation or not."

month, he is not entitled to any salary for the broken portion of the month in the course of which he left the service (*k*). But where the engagement is for full one year, say from 1st April 1908 to 31st March 1909, and the salary is fixed at so much (say Rs. 18) per month, and the servant wrongfully leaves his employer's service on 20th March 1909, he is nevertheless entitled to his salary for the 11 months during which he actually served his employer, less the damages incurred by the employer by the breach, though the salary be payable under the terms of the agreement in a lump sum of Rs. 216 at the end of the year. It was so held by the High Court of Madras, the Court observing that the case was governed by the present section and s. 64, and that ill (c) to s. 65 was almost conclusive in plaintiff's favour (*l*).

Insolvency of promisor.—This is not of itself equivalent to a total refusal to perform the contract, though it may be accompanied by conduct which amounts to a notice of the insolvent debtor's or his representative's intention not to pay his debts or perform his contracts. A seller, however, is not bound to go on delivering goods to an insolvent buyer (*m*). The proofs and illustrations belong to the special subject of Sale of Goods, and will be found collected under s. 97, below.

By whom Contracts must be Performed.

40.—If it appears from the nature of the case that it

Person by whom
promise is to be per-
form-d. was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases the promisor or his representatives may employ a competent person to perform it.

(*k*) *Ranji v. Little* (1873) 10 Bom. v. *Sita Virchand* (1911) 13 Bom. L. R. H. C. 57; *Dhume v. Sevenoaks* (1886) 13 19, cases decided with reference to the Cal. 80; *Ralli Bros. v. Ambika Prasad* special terms of the contract, (1913) 35 All. 132. But see *Raghoonath* (*l*) *Chokalinga v. Mahomed* (1912) 23 *Doss v. Halle* (1871) 16 W. R. 60. See Mad. L. J. 680.
also *Empress of India Cotton Mills Co. v. (m) Ex parte Chalmers* (1873) L. R. 4 *Nasser Chunder Roy* (1896) 2 C. W. N. 8 Ch. 289.
687, and *Aryodaya Spg. & Wg. Co. Ltd.*

S. 40.

Illustrations.

(a) A. promises to pay B. a sum of money. A. may perform this promise, either by personally paying the money to B. or by causing it to be paid to B. by another; and, if A. dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.

(b) A. promises to paint a picture for B. A. must perform this promise personally.

Personal contracts.—Contracts involving the exercise of personal skill and taste, or otherwise founded on special personal confidence between the parties, cannot be performed by deputy. But it is not always easy to say whether a particular contract is, in this sense, personal or not, or what is an adequate performance of a personal contract. The hiring of a carriage from Sharpe, a coachmaker trading under his own name alone, but in fact with a partner, was held to be a personal contract, which the hirer was not bound to go on with after Sharpe had retired from business. "He may have been induced to enter into the contract by reason of the confidence he reposed in Sharpe, and at all events had a right to his services in the execution of it" (n). This has been considered an extreme application of the principle (o), which ought to be applied only where the contract really and substantially has relation to the personal conduct of the contracting party (p). A contract for personal agency or other service entered into with partners is generally determined by the death of a partner, or it may be more accurate to say that it is not held to continue with the surviving partner unless there is something to show a distinct intention to that effect (q). On the other hand, a contract with a firm which has nothing really personal about it so far as regards the partners, for example a contract to perform at a music-hall belonging to the firm, is not generally determined by the death of one member of the firm, especially if the individual members of the firm were not named in the contract and not known to the other party (r). Every case must really be judged on its own circumstances.

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|---|--|
| (n) <i>Robson v. Drummond</i> (1831) 2 B. & Ad. 303; 36 R. R. 569, 572. | [1901] 1 K. B. 59. |
| (o) <i>British Wagon Co. v. Lea & Co.</i> (1880) 1 Q. B. D. 149, 152. | (q) <i>Tasker v. Shepherd</i> (1861) 6 H. & N. 575; 123 R. R. 697. |
| (p) <i>Phillips v. Alhambra Palace Co.</i> | (r) <i>Phillips v. Alhambra Palace Co.</i> [1901] 1 K. B. 59. The defendants |

The illustrations to the section look obvious enough. But the second is not quite so simple as it looks. Suppose A. is not a painter, but a sculptor. Must A. chisel the whole of his statue in the marble with his own hand, or, if the statue is to be in bronze, must he cast it himself? According to all modern usage, he is clearly not bound to do so; he is expected to design and supervise the work, but the manual execution will be done, subject to the master's final touches, by skilled workmen. Benevenuto Cellini cast his own Perseus; Mr. Thornycroft did not cast his own King Alfred. Again, A. is a painter commissioned to carry out a great mural decoration. Must he actually hold the brush that lays on every square inch of paint? Certainly that was not the understanding of the great European painters of the sixteenth and seventeenth centuries and their patrons; the less important parts of the work were executed by pupils and assistants under the master's direction, and it would have been impossible to get the work done otherwise. Still the master was bound to perform his promise personally in the sense that he could not delegate the design or general supervision to a junior. In ascertaining what is contemplated by the parties, usage as well as the express terms must be regarded.

Ordinary contracts for delivery of goods, payment for them and the like, may of course be performed by deputy (s). "There is clearly no personal element in the payment of the price" (t). See notes to s. 37, pp. 257-266 above.

41.—When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Effect of accepting performance from third person.

There is English authority to the effect that discharge of a contract by a third person is effectual only if authorised or ratified by the debtor; but it is not clear that the better modern opinion is not the

were undisclosed partners trading under a quasi-corporate name; the plaintiffs were a troupe of performers, but nothing turns on their number. If one of the plaintiffs had died the case would have been different, as they had undertaken active and personal performances.

(s) *Tod v. Lakhmidas* (1892) 16 Bom. 441, 451; but authority is really needless, even if illustration (a) did not cover it.

(t) *Tolhurst v. Associated Portland Cement Manufacturers* [1902] 2 K. B. 660, 672, per Collins, M.R.

- 41-43. other way (*u*). In India there is no occasion to discuss the point, as the words of the Act leave no room for doubt. It need hardly be added that this section applies only when a contract has in fact been performed by a third person (*v*). *Cp.* the Negotiable Instruments Act, 1881, s. 113.

42.—When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfil the promise.

Devolution of joint liabilities. This is a deliberate variation of the Common Law rule. In England "upon the death of one of several joint contractors the liability under the contract devolves on the survivor, and the representative of the deceased cannot be sued at law, and the jointly with the survivors. Consequently the whole or ultimately devolves upon the last surviving contractual liability, death upon his representatives" (*w*). Limited exception after his introduced by Courts of Equity, and in particular a deceased partner's estate is liable, subject to the prior payment of his separated partner's the unsatisfied debts of the firm (*x*). Parties can, after their contracts what they please; but the presumption, made for British India by the present section appears to be in accordance with modern mercantile usage.

43.—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more (*y*) of such joint promisors to perform the whole of the promise.

Any one of joint promisors may be compelled to perform.

(*u*) See Leake, 686, 6th ed.; Pollock, Lords in *Kendall v. Hamilton* (1879) 4 App. Ca. 504, before which partnership

(*v*) *Har Chandi Lal v. Sheoraj Singh* (1917) 39 All. 178, L. R. 44 I. A. 69, debts were generally supposed to be joint and several for all purposes.

(*w*) Leake, 303.

(*y*) The words "or more" have been

(*x*) Partnership Act, 1890, s. 9, following the decision of the House of inserting by the Repealing and Amending Act (XII of 1891).

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract. S. 43.

Each promisor
may compel con-
tribution.

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Sharing of loss
by default in con-
tribution.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations.

(a) A., B., and C. jointly promise to pay D. 3,000 rupees. D. may compel either A. or B. or C. to pay him 3,000 rupees.

(b) A., B., and C. jointly promise to pay D. the sum of 3,000 rupees. C. is compelled to pay the whole. A. is insolvent, but his assets are sufficient to pay one-half of his debts. C. is entitled to receive 500 rupees from A.'s estate, and 1,250 rupees from B.

(c) A., B., and C. are under a joint promise to pay D. 3,000 rupees. C. is unable to pay anything, and A. is compelled to pay the whole. A. is entitled to receive 1,500 rupees from B.

(d) A., B., and C. are under a joint promise to pay D. 3,000 rupees, A. and B. being only sureties for C. C. fails to pay. A. and B. are compelled to pay the whole sum. They are entitled to recover it from C.

Joint promisors.—The series of sections now before us materially varies the rules of the Common Law as to the devolution of the benefit of and liability on joint contracts (z). As far as the liability under a contract is concerned, it appears to make all joint contracts joint and several (a). It allows a promisee to sue such one or more of several joint promisors as he chooses, and excludes the right of a joint promisor

(z) *Lukmidas Khinji v. Purshotam Haridas* (1882) 6 Bom. 700, 701.

(a) *Motilal Bechardass v. Ghellabhai Hariram* (1892) 17 Bom. 6, 11.

- S. 43. to be sued along with his co-partners (b). There is still considerable difference of opinion in the Indian High Courts as to its consequential operation where a judgment has been obtained against some or one of joint promisors, and the decisions must be examined. We think it the better opinion that the enactment should be carried out to its natural consequences, and that, notwithstanding the English authorities founded on a different substantive rule, such a judgment, remaining unsatisfied, ought not, in British India, to be held a bar to a subsequent action against the other promisor or promisors.

Effect of decree against some only of joint promisors.—In *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (e), it was held by the High Court of Calcutta, following the rule laid down in *King v. Hoare* (d), that a decree obtained against one of several joint makers of a promissory note is a bar to a subsequent suit against others. This was followed by the High Court of Madras in a similar case in *Gurusami Chetti v. Samurti Chinna* (c). But these decisions were dissented from by Strachey, C.J., in *Muhammad Askari v. Radhe Ram Singh* (f). In that case the question was whether a judgment obtained against some of several mortgagors and remaining unsatisfied against them was a bar to a second suit against other joint mortgagors, and the Court held that it did not constitute any bar and that a second suit was maintainable, the doctrine of *King v. Hoare* (g) not being applicable in India, at all events in the Mufassal, since the passing of the Indian Contract Act. Strachey, C.J., said: "My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King v. Hoare* (1844) 13 M. & W. 494, as on the judgments of the Law Lords in *Kendall v. Hamilton* (1879) 4 App. Ca. 504. As explained in those judgments, the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued

(b) *Hemendro Coomar Mullick v. Rajendrolall Moonshee* (1878) 3 Cal. 353, 360; *Muhammad Askari v. Radhe Ram Singh* (1900) 22 All. 307, 315; *Dick v. Dhanji Jaitha* (1901) 25 Bom. 378, 386. Here the minority of one joint promisor does not affect the liability of the other: *Jamma Bai v. Vasanta Rao* (1916) 43 Ind. App. 99.

(c) (1878) 3 Cal. 353.

(d) (1844) 13 M. & W. 494; 67 R. R. 694.

(e) (1881) 5 Mad. 37.

(f) (1900) 22 All. 307. See also *Abdul Aziz v. Basdeo Singh* (1912) 34 All. 604, 606.

(g) (1844) 13 M. & W. 494; 67 R. R. 694.

on is essentially based on the right of joint debtors in England to have all their co-contractors joined as defendants in any suit to enforce the joint obligation. That right was in England enforceable before the Judicature Acts by means of a plea in abatement, and since the Judicature Acts by an application for joinder which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by s. 43 of the Contract Act, and therefore, the basis of the doctrine being absent, the doctrine itself is inapplicable. *Cessante ratione legis, cessat ipsa lex.*"

S. 43.

The reasoning of Strachey, C.J., seems to us conclusive ; but until it has been adopted by the other High Courts or confirmed by the Judicial Committee of the Privy Council the point must be regarded as open. The Madras High Court, in later cases, seems inclined to adopt the opinion expressed in the first paragraph of the commentary on this section (*h*).

Coming next to the High Court of Bombay, the doctrine of *King v. Hoare* was assumed to be applicable to India by that Court in *Lakmidas Khimji v. Purshotam Haridas* (*i*), and in *Laksmishankar v. Vishnuram* (*j*). In the latter case it was held that the principle of *King v. Hoare* did not apply to the facts of the case, as the decree in the first suit against one of the partners, which was set up as a bar to a subsequent suit against all the partners, was made by the Civil Court of Baroda, which had no jurisdiction over some of the partners who resided in British territory. On the other hand, there is a dictum of Farran, J., in *Motilal v. Ghelabhai* (*k*) that the present section appears to make all contracts joint and several. The applicability to India of the rule in *King v. Hoare* was again considered by the same Court in *Dick v. Dhunji Jaittha* (*l*), but the point was not decided, as the Court thought it did not arise directly for decision. In a recent case (*m*) where the question was whether the plaintiff having sued an agent to judgment was entitled under s. 233 (below) subsequently to

(*h*) *Mool Chand v. Alwar Chetty* (1916) 39 Mad. 548, 551-552; *Ramanjulu v. Aravamudan* (1909) 33 Mad. 317, 319-321.

(*i*) (1892) 17 Bom. 6, 11. See also *Gorind v. Sakharam* (1904) 28 Bom. 383.

(*j*) (1901) 25 Bom. 378.

(*k*) (1882) 6 Bom. 700.

(*m*) *Shielal v. Birdichand* (1917) 19 Bom. L. R. 370, 377-380.

(*l*) (1899) 24 Bom. 77.

- S. 43. maintain a suit against the principal, Macleod, J., expressed his dissent both from the reasoning and the decision of Strachey, C.J., in *Muhammad Askari's* case and held that the present section merely took away the right of a joint promisor to have his co-promisor joined with him in the action, and did not enable the promisee to file separate actions against both. "It could not have been intended", said the learned Judge, "to deprive the second co-contractor of his right to plead the previous judgment, or to split up one cause of action into as many causes of action as there were joint contractors". This view was adopted by Kajiji, J., in a still later decision (n). We still agree with Strachey, C.J.

Judgment against one joint promisor who admits claim after institution of suit does not bar the suit against other joint promisors. In the last-mentioned case the plaintiff sued the defendants, alleging that they were partners, and at the hearing one of the defendants admitted the plaintiff's claim, and judgment was thereupon passed against him for the amount claimed. On behalf of the other defendants it was contended that, the cause of action alleged in the plaint being joint, it merged in the judgment recovered against the first defendant, and that further proceedings in the suit were therefore barred. The Court did not accede to this contention, and it was held that the judgment recovered against the first defendant did not bar further prosecution of the suit against the others. Reference was made in the course of the judgment to s. 153 of the Code of Civil Procedure, 1882 (now O. 15, r. 2, Code of Civil Procedure, 1908). As to *King v. Hoare*, it was stated that the rule there laid down did not apply to the facts of the case under consideration.

Suit against one of several partners.—In *Lukmidas Khmji v. Purshotam Haridas* (o) it was held in a suit brought upon a contract made by a partnership firm that a plaintiff may select as defendants those partners of the firm against whom he wishes to proceed. This decision was cited with approval by Farran, C.J., in *Motilal Bechar Dass v. Ghellabhai Hariram* (p) and was followed by the High Court of

(n) *Markandrai v. Virendrarai* case Farran, C.J., observed that ss. 42, (1917) 19 Bom. L. R. 837, 843. 43, and 45 related to partners as well
 (o) (1882) 6 Bom. 700. as to other co-contractors, and that if
 (p) (1892) 17 Bom. 6, 11. In that the Legislature had intended to except

Madrasin Narayana Chetti v. Lakshmana Chetti (g) where it was held in a similar case that according to the law declared in s. 43 of the Contract Act, especially when taken with s. 29 of the Code of Civil Procedure (r), it is not incumbent on a person dealing with partners to make them all defendants, and that he is at liberty to sue any one partner as he may choose. It will be noted in this case that the Court expressly applied to partners not only s. 43 of the Contract Act, but also s. 29 of the Code of Civil Procedure, which relates not to joint, but to several and to joint and several, liability. The same view of the section has been taken by the Punjab Chief Court (s).

In this connection may be noted O. 1, r. 10, of the Code of Civil Procedure, which provides that the Court may order, either of its own motion or on the application of a party to a suit, "that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions in the suit, be added." The effect of s. 43 being, according to the above decisions, to render the liability of joint promisors joint and several and to exclude the right of a joint contractor to be sued along with his co-contractors, the provisions of O. 1, r. 6, are applicable to the case, and the promisee is at liberty to sue any one or more of the joint promisors. But this right is distinct from, and does not affect, the right of a defendant to apply to the Court

partners from the provisions of this section it would have done so in express words. See, however, *Laksmishankar v. Visknuram* (1899) 24 Bom. 77, where the Court held, without any reference to the earlier case, that the liability of partners was joint, and that no one partner could change it into a joint and several liability without the consent of the other partners.

(g) (1897) 21 Mad. 256. See also (1878) 3 Cal. 353, 359, 360, and (1900) 22 All. 307, 315.

parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract, including parties to bills of exchange, hundis, and promissory notes."

(r) S. 29 of the Code of Civil Procedure, 1882 (now C. 1, r. 6, in the Code of 1908), runs as follows: "The plaintiff may, at his option, join as

The judgment seems to assume that the effect of s. 43 was to make all joint contracts joint and several. See *Motilal Bechar Dass v. Ghellabhai Hariram* (1892) 17 Bom. 6, 11; and *Muhammad Askari v. Radhe Ram Singh* (1900) 22 All. 307, 316.

(s) *Jag Lal v. Shib Lal* (1902) Punj. Rec. no. 37; *Thomas Beck v. Thomas Siddle* (1892) Punj. Rec. no. 11; *Livingstone v. Feroz Din* (1914) Punj. Rec. no. 107, p. 396 (joint tenants).

§. 43. under O. 1, r. 10, of the Code to have his co-contractor added as a party.

But such an application, it is conceived, can be sustained not on the ground that the joint contractor "ought to have been joined" as defendant, but only under the latter branch of the section, if the Court considers it necessary to do so (t).

Co-heirs.—This section speaks of two or more persons making a joint promise, and it has no application where parties become jointly interested by operation of law in a contract made by a single person.

(t) Note the observations of Strachey, C.J., in *Muhammad Askari v. Ralhe Ram Singh* (1900) 22 All. 307, 316, 317: "In their note to s. 43, Messrs. Cunningham and Shephard, at pp. 158, 159, of their commentary on the Indian Contract Act, 7th ed., say that, 'if this section is intended to deny to joint debtors the right to be sued jointly in one suit, it involves a departure from English law,' and that, 'in view of this section and the 29th section of the Code of Civil Procedure, it is clear that the non-joinder of a co-debtor is no ground of defence to a suit; but it is apprehended that an application made under the 32nd section of the Code to add as a defendant an omitted co-debtor would be dealt with in the same manner as it is in England.' I cannot agree with this view. As the judgments in *Kendall v. Hamilton* (1879) L. R. 4 A. C. 504, show, such an application would in England be dealt with in the same manner as the old plea in abatement, and the effect of the latest decisions is that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie*, right to have his co-debtors joined: *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.* [1893] 1 Q. B. 422; *Robinson v. Geisel* [1894] 2 Q. B. 685."

based on the provisions of s. 43 of the Contract Act, it seems to me that that section merely takes away the right of a joint debtor to be sued jointly and to plead in abatement a right which was abolished in England by the Judicature Acts. It is still open to a defendant to apply to the Court for joinder of a person who ought to have been included in the action; and, to use the words of Earl Cairns, L.C., in *Kendall v. Hamilton* (1879) 4 App. Ca. 504, 'the application to have a person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed.' S. 32 of the Civil Procedure Code gives the Court absolute discretion, either on application or *suo motu*, to dismiss or add parties."

The opinion expressed by Mr. Justice Crowe corresponds to a considerable extent with that of Messrs. Cunningham and Shephard. We agree with Strachey, C.J., in thinking that an application under O. 1, r. 10, to add as defendant an omitted debtor should not be dealt with as in England, but on the principles expressed in the Contract Act and to be reasonably inferred from its language.

Note also the observations of Crowe, J., in *Dick v. Dhunji Jaittha* (1901) 25 Bom. 378, 386, where the learned Judge (1913) 17 Cal. W. N. 833.

Hence the section does not apply to the case of several heirs of the original debtor (*u*). Therefore any one tenant, on paying the whole rent, is entitled to contribution from the other tenants (*v*). S. 4

Contribution between joint promisors.—This clause represents the doctrine of English equity as distinct from that of the Common Law Courts. It would be useless to cite English authorities.

Joint tenants are joint promisors; therefore the liability is only to contribute to the performance of the promise. Hence if one of several persons jointly liable for a debt is sued, and is compelled to satisfy the debt and the costs of the suit, he can only call on the others to contribute in respect of the debt, and not in respect of the costs (*w*).

When liability to contribute arises.—In a case decided before the enactment of the Contract Act, it was held that the mere existence of a decree against one of several joint debtors does not afford ground for a suit for contribution against the other debtors. "Until he has discharged that which he says ought to be treated as a common burden or at any rate done something towards the discharge of it, he cannot say that there is anything of which he has relieved his co-debtors, and which he can call upon them to share with him" (*x*). And the law under the Contract Act would appear to be the same: see illustrations to the section (*y*).

Contribution as between judgment debtors.—The question as to whether, as between persons against whom a joint decree has been passed, there is any right of contribution at all depends upon the question whether the defendants in the former suit were wrong-doers in the sense that they knew or ought to have known that they were doing an illegal or wrongful act. In that case no suit for contribution will lie (*z*). Thus where a decree for costs against two defendants

(*u*) *Shahk Salad v. Krishna Mohan* (1887) 5 Cal. 720, citing *Merryweather v. Nixan* (1799) 8 T. R. 186; 16 R. R. 810; 1 Sm. L. C. 383, 10th ed. (The real leading case is, however, *Adamsen*

(*v*) *Nirdosh v. Jakaria* (1914) 20 Cal. L. J. 492.

(*w*) *Punjab v. Petum Singh* (1874) 6 N.-W. P. 192.

(*x*) *Ram Pershad Singh v. Neerbhoy Singh* (1872) 11 B. L. R. 76.

(*y*) See *Abraham v. Raphial* (1916) 39 Mad. 288, 291.

(*z*) *Punat Singh v. Imrit Tewari*

(1887) 5 Cal. 720, citing *Merryweather v. Nixan* (1799) 8 T. R. 186; 16 R. R. 810; 1 Sm. L. C. 383, 10th ed. (The real leading case is, however, *Adamsen v. Jarvis* (1827) 4 Bing. 66; 29 R. R. 503. See [1894] A. C. at p. 324.) *Hari Saran Maltra v. Jolindra Mohan Lahiri* (1900) 5 C. W. N. 393; *Mohesh Chandra v. Roydya Nath* (1901) 6 C. W. N. 88; *Krishna Ram v. Rakmini Sewak Singh* (1887) 9 All. 221.

43, 44. jointly was executed against one of them, who had set up a false defence in the suit in collusion with the other, and the former sued the latter for contribution, it was held that the suit would not lie (a). In a recent case (b) the High Court of Madras considered it an open question how far the rule in *Merryweather v. Nizam* (c), which lays down that there is no contribution between joint tortfeasors, was applicable to India, having regard to the observations of Lord Herschell in *Palmer v. Wick, etc., Steam Shipping Co.* (d), where the noble lord said that the rule did not appear to him "to be founded on any principle of justice or equity or even of public policy which justifies its extension to the jurisprudence of other countries." The same doubt has been expressed by the High Court of Allahabad (e).

44.—Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

We have here another variation of English law (f). In England the releasing creditor must expressly reserve his rights against the co-debtors if he wishes to preserve them (g).

This section applies equally to a release given before or after breach. Thus where in a suit (h) for damages against several partners

(a) *Vajrangara v. Pariyngot* (1883) 7 Mad. 89; *Sudhu Singh v. Lekhna Singh* (1901) Punj. Rec. no. 7; *Gobind Chunder v. Srigo-bind* (1897) 24 Cal. 330. See also as to contribution between judgment debtors *Brojendra Kumar Roy v. Rash Behari Roy* (1886) 13 Cal. 300, and *Lakshmana Ayyan v. Rangasami Ayyan* (1894) 17 Mad. 78, where it was held upon the facts of the case that one judgment debtor against whom execution had been levied was entitled to contribution against the rest.

(b) *Siva Panda v. Jajusti Panda* (1902) 25 Mad. 599.

(c) See note (z), above.

(d) [1894] A. C. 318, 324.

(e) *Nihal Singh v. The Collector of Bhandashahr* (1916) 38 All. 237, 240.

(f) See *Krishna Charan v. Sana Kumar* (1917) 44 Cal. 162, 174.

(g) There is no different equitable doctrine. In *Ex parte Good* (1877) 5 Ch. Div. 46, the document in question was held not to be a release at all, and the general rule not disputed; see at p. 57.

(h) *Kirtee Chunder v. Struthers* (1878) 4 Cal. 336.

the plaintiff compromised the suit with one of them, and undertook to withdraw the suit as against him, it was held that the release did not discharge the other partners, and the suit might proceed as against them. For the latter it was contended that the section occurred in the portion of the Act relating to the performance of contracts, and that it did not therefore apply to liabilities arising out of the breach of a contract. The Court held that such a construction of the section was too narrow.

The principle of this section has also been applied to judgment debts. It has thus been held that a release by a decree holder of some of the joint judgment debtors from liability under the decree, does not operate as a release of the other judgment debtors (i).

45.—When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration.

A., in consideration of 5,000 rupees lent to him by B. and C., promises B. and C. jointly to repay them that sum with interest on a day specified. B. dies. The right to claim performance rests with B.'s representatives jointly with C. during C.'s life, and after the death of C. with the representatives of B. and C. jointly.

Promise to two or more persons jointly.—This section applies to all joint promisees whether they be partners (j), co-sharers (k), or members of a joint Hindu family carrying on business in partnership (l). There is nothing in this enactment to show what happens to a

(i) *Mool Chand v. Alwar Chetty* (1892) 17 Bom. 29, (1916) 39 Mad. 548.

(l) *Ramsebuk v. Ramlall Koonoo*

(j) *Motilal v. Ghellabhai* (1892) 17 Bom. 6, 13; *Aga Gulam Husain v. A. D. Sassoon* (1897) 21 Bom. 412, 421.

(1881) 6 Cal. 815; *Kalidas v. Nathu Bhagvan* (1883) 7 Bom. 217; *Ram Narain v. Ram Chunder* (1890) 18 Cal.

(k) *Balkrishna v. The Municipality of Mahad* (1885) 10 Bom. 32; *Ram-*

80; *Alagappa Chetti v. Vellian Chetti* (1894) 18 Mad. 33.

8. 45. *single* right when the owner of it dies, and several persons become entitled to it (*m*). In such a case, it has been held that all of them must join in a suit to enforce the right, and if any of them refuses to join as plaintiff, he must be added as a defendant (*n*).

Right to performance of promises during joint lives.—As the right to claim performance of a promise in the case of joint promisees rests with them all during their joint lives, it follows that all the joint promisees should sue upon the promise (*o*). If a suit is, therefore, brought by some of them only, and the other promisees are subsequently added as plaintiffs, whether on objection taken by the defendant (*p*) or by the Court of its own motion (*q*), the whole suit will be dismissed if it is at that time barred by limitation as regards the other promisees.

In this connection we may note the provisions of the Code of Civil Procedure, 1908, O. 30, r. 4, which are as follows:—

“(1) Notwithstanding anything contained in section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

“(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have (a) to apply to be made a party to the suit or (b) to enforce any claim against the survivor or survivors.”

Validity of discharge by one of several joint promisees.—See notes under the same head to s. 38 (p. 274 above).

(*m*) *Kandhiya Lal v. Chandar* (1884) 7 All. 313, 322.

(*n*) *Ib.*; *Akinsa Bibi v. Abdul Kader* (1902) 25 Mad. 26, 35; *Mahamed Ishaq v. Sheikh Akramul Haq* (1908) 12 C. W. N. 84, 86, 93.

(*o*) *Dular Chand v. Batram Das* (1877) 1 All. 453; *Jowala Nath v. Rupa* (1882) Punj. Rec. no. 175. But if a contract is entered into with one partner only it is competent for him to maintain a suit by himself without making his

partners co-plaintiffs: *Mehr Singh v. Chela Ram* (1906) Punj. Rec. no. 127. See *Akinsa Bibi v. Abdul Kader* (1902) 25 Mad. 26; *Imam-ud-din v. Liladhar* (1892) All. W. N. 104.

(*p*) *Ramsebak v. Ramlall Koondoo* (1881) 6 Cal. 315; *Kalidas v. Nathu Bhagwan* (1883) 7 Bom. 217; *Fatmabai v. Pirbhai* (1897) 21 Bom. 580.

(*q*) *Imam-ud-din v. Liladhar* (1892) 14 All. 524; *Ram Kinkar v. Akhil Chandra* (1908) 35 Cal. 519.

Suit by a surviving partner.—The general rule of English law is (contrary to the present section) that joint contracts are enforceable by the survivors or survivor alone. There is an equitable exception, founded on mercantile custom, as to debts due to partners; but even in this case, “although the right of the deceased partner devolves on his executor, . . . the remedy survives to his co-partner, who alone must enforce the right by action, and will be liable on recovery to account to the executor or administrator for the share of the deceased” (r). The present section extends the mercantile rule of substantive right to all cases of joint contracts. But it does not follow that it was intended to alter the rules of procedure in cases where the mercantile rule of substance was already admitted. It seems therefore to be the better opinion that the representatives of a deceased partner are not necessary parties to a suit for the recovery of a debt which accrues due to the partnership in the lifetime of the deceased (s). It has been so laid down by the High Courts of Allahabad, Bombay, and Madras; but the contrary has been maintained by the Calcutta High Court (t). English law and the alteration of it by the Act were discussed, and the difficulty occasioned by the words “as between him and them” in connection with this point was considered by Farran, J., in *Motilal v. Ghellabhai* (u). The learned Judge there stated, “It is difficult to give these words their full effect if the surviving contractors in the case of partners are allowed to sue alone. The right to performance of the contract as far as the other contracting party is concerned rests just as much with the representative of the deceased partner as with the surviving partner. Can the latter then sue without joining the former as a party to the suit? Logical consistency points to an answer in the negative. The case of partners is, however, as we have shown, anomalous, and we think that, as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners,

(r) Williams on Executors, 10th ed. 365; *Ugar Sen v. Lakhmichand* (1910) (1905), p. 638. 32 All. 638; *Mulk Raj v. George Knight* (1906) Punj. Rec. no. 10.
 (s) *Gobind Prasad v. Chandar Sekhar* (1887) 9 All. 486; *Motilal v. Ghellabhai* (1892) 17 Bom. 6; *Vaidyanatha Ayyar v. Chinnusami Naik* (1893) 17 Mad. 18; *Debi Das v. Nirpat* (1898) 20 All. 18; *Ram Narain v. Ram Chunder* (1890) 18 Cal. 86.
 (t) *Ram Narain v. Ram Chunder* (1890) 18 Cal. 86.
 (u) (1892) 17 Bom. 6, 14.

45. we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Causes Court need not be changed."

The case is not literally covered by s. 263, but it may be held that a contrary intention within the meaning of the present section sufficiently appears from the nature of the transaction when it is once ascertained to be a partnership transaction, regard being had to the uniform and well-understood course of practice.

With regard to the supposed anomaly, it disappears when we remember that in mercantile usage the firm is regarded as a person distinct from the individual partners so long as the partnership exists and is not fully wound up; and this view is now to a certain extent recognised in English procedure by allowing actions to be brought by and against partners in the name of the firm (*v*). Very much the same procedure has been introduced by the Code of Civil Procedure, 1908 (*w*).

In so far as the firm is treated like a person, the executors of a deceased partner are no more appropriate parties to the recovery of a partnership debt than the executors of a deceased shareholder to the recovery of a debt due to an incorporated company.

Suit by representative of deceased partner.—The representative of the estate of a deceased partner may maintain a suit for the recovery of a partnership debt, and may join the surviving partners as defendants in the suit where they refuse to join as plaintiffs (*x*).

Right of performance of representative jointly with survivor.—Where, by the terms of a mortgage, interest was payable by the mortgagor to two mortgagees jointly, it was held that upon the death of one of the mortgagees his legal representative was entitled to a moiety of the interest due under the mortgage (*y*).

Survivorship in case of Government Securities.—The Indian Securities Act XIII of 1886, s. 5, runs as follows:—

"1. Notwithstanding anything in the Contract Act, 1872, s. 45, when a Government security is payable to two or more persons jointly, and either

(*v*) Order XLVIII A; Pollock, Digest of Law of Partnership, 10th ed. p. 145. *Sassoon* (1897) 21 Bom. 412, 421.

(*w*) See Order XXX.

(*y*) *Kanthu Punja v. Vittamma* (1901) 25 Mad. 385.

(*x*) *Aga Gulam Husain v. A. D.*

or any of them dies, the security shall be payable to the survivor or survivors of those persons. Ss. 45,

"2. Nothing herein contained shall affect any claim which the representatives of the deceased person may have against the survivor or survivors in respect of the security jointly payable to him or them and the deceased.

"3. This section shall apply whether death of the person to whom the security was jointly payable occurred or occurs before or after this Act comes into force."

Time and Place for Performance.

46.—Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Time for performance of promise where no application is to be made and no time is specified.

Explanation.—The question "what is a reasonable time" is, in each particular case, a question of fact.

"Engagement."—The word "engagement" in this section is a survival from the language of the original draft, in which, for some reason not easy to understand, it is constantly used instead of "agreement" or "promise." Here it is synonymous with "promise."

Reasonable-time.—It is also difficult to understand why decisions should be reported on the question of what is reasonable time, which is declared by the Act itself to be always a question of fact; but, having been reported, they must be mentioned. Where the defendants agreed to supply coal to the plaintiffs from time to time, as required by the defendants, on reasonable notice given to them, it was held that a notice given by the plaintiffs on the 22nd July, 1898, for the supply of 2,648 tons of coal on or before 31st August, 1898, was not reasonable (z). Jenkins, C.J., said: "Perhaps it might have been physically possible for the defendants to carry out such an order, but it would clearly have required an effort which the plaintiffs had no right to demand. I do not think that a notice involving such an effort from business men with innumerable other matters to attend to can be held to be such a reasonable notice as was intended by both parties

(z) *The Bengal Coal Co., Ltd. v. 104.*
Homee Wadia & Co. (1899) 24 Bom. 97.

46, 47. when this document was given." And where the defendant agreed to discharge a debt due by the plaintiff to a third party and in default to pay to the plaintiff such damages as he might sustain, and no time was fixed for the performance of the obligation, it was held that the failure of the defendant to perform it for a period of three years amounted to a breach of the contract, as that was a sufficient and reasonable time for performance (a).

Compare the Negotiable Instruments Act XXVI of 1881, s. 105, which runs as follows :—

"In determining what is a reasonable time for presentment for acceptance or payment, for giving notice of dishonour, and for noting, regard shall be had to the nature of the instrument and the usual course of dealing with respect to similar instruments ; and in calculating such time public holidays shall be excluded."

47.—When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Time and place for performance of promise where time is specified and no application to be made.

Illustration.

A. promises to deliver goods at B.'s warehouse on the 1st January. On that day A. brings the goods to B.'s warehouse, but after the usual hour for closing it, and they are not received. A. has not performed his promise.

Common Law rule.—This section, with the illustration, simplifies the rule. According to the Common Law as laid down in the only modern case on the subject (b), the illustration would have run thus : "B. is not bound to be at the warehouse to receive the goods after the usual hours of business, and if he is not there A. has not performed his promise. If B. is there and could receive the goods before midnight, but refuses to do so, A. has performed his promise." There are some further minute distinctions in English law which it would be useless

(a) *Dorasinga v. Arunachalam* (1899) 23 Mad. 441 ; *Subramaniam v. Muthia Man. & C.* 593 ; 64 B. R. 810. (1912) 35 Mad. 639. (b) *Startup v. Macdonald* (1843) 6

to cite here (c). The amendment made by this section is obviously in accordance with good sense, though the English rule is capable of a logical explanation. Ss.

Delivery on Sunday.—In a suit for damages against the defendant, a German, for non-delivery of goods, it was contended that he was not bound to deliver the goods on Sunday, which was the last day named in the contract for performance. It was held that the “Lord’s Day Act” did not apply to India, at any rate not to the defendant, who was a German, and that, in the absence of a custom to the contrary, he was bound to deliver the goods on that day if they had not already been delivered (d).

48.—When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation.—The question “what is a proper time and place” is, in each particular case, a question of fact.

The proper place will, of course, be the place named in the contract, if any. Where more than one place is named, “it is for the person to whom payment is to be made to fix the place at which he will be paid; until he has selected the place at which he will be paid there can be no default.” The English decision from which we quote would presumably be followed here (e).

49.—When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place (f).

Place for performance of promise where no application to be made and no place fixed for performance.

(c) They are stated in Leake 614 - 615.

(d) *Lalchand Balkissan v. John L. Kersten* (1890) 15 Bom. 338.

(e) *Thorn v. City Rice Mills* (1889) 40 Ch. D. 357, 360.

(f) *Qu.* whether failure to perform

this preliminary duty amounts to a breach of the whole contract. See *Armistage v. Insole* (1850) 80 R. R. 388; 14 Q. B. 728.

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Illustration.

A. undertakes to deliver a thousand maunds of jute to B. on a fixed day. A. must apply to B. to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

Rule of Common Law.—In the Common Law the rule as to money payments (which, however, is rendered practically obsolete by the methods of modern business) is that, if no place is named, the debtor is bound to find the creditor, provided he is within the jurisdiction (g); but if the obligation is to deliver heavy or bulky goods he must procure the creditor to appoint a place to receive them. “And so note a diversitie between money and things ponderous, or of great weight” (h). The present section lays down a reasonable rule for all cases without distinction (i). The late Tyabji, J., seems to have overlooked the present section when he said that “where no specific contract exists as to the place where the payment of the debt is to be made, it is clear that it is the duty of the debtor to make the payment where the creditor is” (j).

Place of delivery.—Where by an agreement for the sale of goods it was stipulated that the goods were “to be delivered at any place in Bengal in March and April, 1891,” and it was added, “the place of delivery to be mentioned hereafter,” it was held by the Judicial Committee that the buyer had the right to fix the place, subject only to the express contract that it must be in Bengal and to the implied one that it must be reasonable. The use of the words “place of delivery to be mentioned hereafter” did not take away that right, nor did they leave the question of the place of delivery to be settled by a subsequent agreement. If the latter had been meant, the expression used would have been “agreed on” instead of “mentioned”. It was also held that such a contract does not fall within s. 94 of the Act, but rather

(g) See *Haldane v. Johnson* (1853) 8 Ex. 689; 91 R. R. 705; *Kedarnal Bhuramal v. Surajmal Govindram* (1907) 9 Bom. L. R. 903, at p. 911; *Puttappa Manjaya v. Virabhadrapa* (1905) 7 Bom. L. R. 993.

(h) Co. Lit. 210 b. The danger of travelling about England with any considerable sum of money, which was

serious in Littleton's time and appreciable in Coke's, does not seem to have been thought of as an objection. But archaic law rarely favours debtors.

(i) As to delivery of goods sold see ss. 93, 94.

(j) *Motilal v. Surajmal* (1906) 30 Bom. 167, at p. 171; See also *Dhunjiasha v. Fforde* (1887) 11 Bom. 649, 656.

resembles what is contemplated in the present section (k).

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“Without application by the promisee.—This section does not apply to cases where money is made payable *on demand* by the promisee (l).

Place of performance in pakki adat contracts.—In the case of *pakki adat* agency the place of payment is the place where the constituent resides, unless he has chosen to fix another place by express direction (m).

50.—The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.

Performance in manner or at time prescribed or sanctioned by promisee.

Illustrations.

(a) B. owes A. 2,000 rupees. A. desires B. to pay the amount to A.'s account with C., a banker. B., who also banks with C., orders the amount to be transferred from his account to A.'s credit, and this is done by C. Afterwards, and before A. knows of the transfer, C. fails. There has been a good payment by B.

(b) A. and B. are mutually indebted, A. and B. settle an account by setting off one item against another, and B. pays A. the balance found to be due from him upon such settlement. This amounts to a payment by A. and B., respectively, of the sums which they owed to each other.

(c) A. owes B. 2,000 rupees. B. accepts some of A.'s goods in reduction of the debt. The delivery of the goods operates as a part payment.

(d) A. desires B., who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B. puts into the post a letter containing the note duly addressed to A.

Manner and time of performance.—This rule is elementary. It may be doubted whether illustration (c) does not rather belong to s. 63, but no practical difficulty can arise. The facts of illustration (d) must not

(k) *Grenon v. Ischmi Narain Auagar*. Bom. 364. As to the incidents of *pakki* *adat* in general, see *Kanji v. Bhagwandas* (1905) 7 Bom. L. R. 57, at p. 65, and s. c. on app. *sub nom.*, *Bhagwandas v. Kanji* (1906) 30 Bom. 205.

(l) *Raman Chettiyar v. Gopalachari* (1908) 31 Mad. 223, at p. 228.

(m) *Kedarnal v. Surajmal* (1908) 33

50, 51. be confused with those which have given rise to troublesome questions in cases of contracts by correspondence (ss. 4 and 5, p. 36 sqq. above). Here a complete contract is assumed to exist. It is hardly needful to add that where the request is to send not legal currency, but a cheque or other negotiable instrument, this does not imply any variation of the rule that payment by a negotiable instrument is conditional on its being honoured on presentation within due time (n).

Payment to an agent, who to the debtor's knowledge had no authority to receive the payment, does not discharge the debtor (o).

Performance of Reciprocal Promises.

51.—When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Promisor not bound to perform, unless reciprocal promisee ready and willing to perform.

Illustrations.

(a) A. and B. contract that A. shall deliver goods to B. to be paid for by B. on delivery.

A. need not deliver the goods unless B. is ready and willing to pay for the goods on delivery.

B. need not pay for the goods unless A. is ready and willing to deliver them on payment.

(b) A. and B. contract that A. shall deliver goods to B. at a price to be paid by instalments, the first instalment to be paid on delivery.

A. need not deliver, unless B. is ready and willing to pay the first instalment on delivery.

B. need not pay the first instalment, unless A. is ready and willing to deliver the goods on payment of the first instalment.

Simultaneous performance.—This section expresses the settled rule of the Common law. To understand the principle rightly, we must remember that in a contract by mutual promises the promises on either side are the consideration, and the only consideration, for one another.

(n) See *Kedarnath v. Surajmal* (1907) 9 Bom. L. R. 903, at p. 911. (o) *Mackenzie v. Shib Chunder Seal* (1874) 12 B. L. R. 360.

But the terms of a promise may express or imply conditions of many kinds; and the other party's performance of the reciprocal promise, or at least readiness and willingness to perform it, may be a condition. It is obviously immaterial whether it is called a condition or not, if in substance it has that effect. To say "I will pay when you deliver the goods" is more courteous than to say "If you do not deliver the goods in a reasonable time you will not be paid"; but "when" implies "if," and the result is the same. And if it appears on the whole from the terms or the nature of the contract that performance on both sides was to be simultaneous, the law will attach such a condition to each promise, with the operation laid down in the present section. S. 51.

Performance of one party's promise may have to be completed or tendered before he can sue on the other's reciprocal promise. In that case it is said to be a *condition precedent* to the right of action on the reciprocal promise.

Where the performances are intended to be simultaneous, as supposed in this section (goods to be delivered in exchange for cash or bills, and the like), they are said to be concurrent conditions, and the promises to be *dependent*. Observe that "concurrent conditions are only a modified form of conditions precedent" (p).

Promises which can be enforced without showing performance of the plaintiff's own promise, or readiness or willingness to perform it, are said to be *independent*.

It is doubtful whether these terms are of much or any real use. "The real question, apart from all technical expressions, is what in each instance is the substance of the contract" (q). But the terms cannot be said to be wholly obsolete, and acquaintance with them is necessary for the understanding of the English decisions.

In order to apply the rule of this section we must know whether the promises are or are not "to be simultaneously performed." This is a question of construction, depending on the intention of the parties collected from the agreement as a whole. Before Lord Mansfield's time the Courts were inclined to hold every promise or

(p) Langdell, Summary, § 32.

Williams (1872) L. R. 7 Ex. at p. 261.

(q) Per Martin, B., *Bradford v.*

8. 51. covenant complete in itself and independent (r), but there has been no such presumption for more than a century.

In 1773 Lord Mansfield said that "the dependence or independence of covenants was to be collected from the evident sense and meaning of the parties" (s), and similarly Lord Kenyon in 1797: "Whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done" (t).

There is a distinct question from that of "condition precedent," namely, whether failure to perform some parts of a contract deprives the party in fault of any right to remuneration for that which he has performed, and entitles the other to put an end to the contract, or is only a partial breach which leaves the contract as a whole still capable of performance. In dealing with covenants of this kind it may be very difficult to ascertain the true intention of the parties. We have to "see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for, or whether it merely partially affects it and may be compensated in damages" (u). Illustration (b) suggests, though it does not actually raise or decide, a point which has given much trouble, and is not settled either by any of the general provisions of the Act, or by any disposition of the chapter on the Sale of Goods. If A. fails to deliver the first instalment of the goods, or delivers a short quantity, may B. put an end to the contract? The better opinion, supported by decisions of the Court of Appeal in England and of the Supreme Court of the United States (v), is that, in the absence of any specific indication of a contrary intention, he may. But there are also decisions difficult to reconcile with this view (w). The Sale of Goods Act, 1893,

(r) For the history of the change see 1 Q. B. D. 183.

Langdell, Summary, §§ 139—143.

(s) *Kingston v. Preston*, cited in *Div. 92; Norrington v. Wright* (1885) 115 U. S. 189.

Jones v. Barkley, Doug. 659; Finch, Sel. Ca. 735, 736.

(t) *Morton v. Lamb*, 7 T. R. 125; 8 Q. B. 14; *Freeth v. Eurr* (1874) 4 R. R. 395; Finch, Sel. Ca. at p. 741.

(u) *Per Cur., Eellini v. Gye* (1876) that failure in payment for one instal-

(v) *Simpson v. Crippin* (1872) L. R.

(w) *Honck v. Muller* (1881) 7 Q. B.

L. R. 9 C. P. 208, which decides only

s. 31, has purposely left the point open as "in each case depending on the terms of the contract and the circumstances of the case." .. 51.

It seems difficult at this day (except as to the unsettled question last mentioned, which is confined to the sale of goods by instalments) to add anything in principle to the modern rule; and Indian decisions are, as might be expected, merely illustrative.

A contract for the sale of shares in a company to be transferred into the name of the purchaser upon payment of the price by him on or before a certain day falls within this section, so that transfer of the shares and payment of the purchase-money should be concurrent acts (*x*).

Waiver of performance.—The section does not, of course, give any remedy to a party who has chosen to perform his part without insisting on the reciprocal performance which was intended to be simultaneous with his own, as where a seller of goods "for cash on delivery" chooses to deliver the goods without receiving the price (*y*).

Readiness and willingness.—In the case of a contract for the sale of shares in a company it is not necessary, in order to prove that a vendor was ready and willing to perform his part of the agreement, that he should be the beneficial owner of the shares, or that he should tender to the purchaser the final documents of title to the shares. It is enough that he should be able and willing to constitute the purchaser the legal owner of the shares agreed to be sold. Thus where the vendor tendered to the purchaser share allotment and receipt papers, and together with each a transfer paper and an application paper, both signed in blank by the original allottee, it was held that the vendor was ready and willing to perform his promise (*z*). But where

ment is not a repudiation of the whole contract, and to that extent is confirmed by *The Mersey Steel and Iron Co.'s Case* (1884) 9 App. Ca. 434; see p. 279, above.

(*x*) *Imperial Banking and Trading Co. v. Atmaram Mulharji* (1865) 2 P. H. C. 246; *Imperial Banking and Trading Co. v. Pranjivandas Harjivandas* (1866) 2 B. H. C. 258.

(*y*) *Soolan Chund v. Schiller* (1878)

4 Cal. 252. The case turned really on s. 59 (see p. 278 sqq., above), and it was not seriously arguable that s. 51 had anything to do with it.

(*z*) *Imperial Banking and Trading Co. v. Atmaram Mulharji* (1865) 2 B. H. C. 246. See also *Parbhudas Pranjivandas v. Ramlal Bhagirath* (1866) 3 B. H. C. 69, where "share receipts" with applications for transfer were tendered to the purchaser.

- §. 51. neither the transfer nor the form of application for transfer was offered to the purchaser, nor had the vendor any such documents signed by the original allottee in his possession, it was held that the vendor could not be said to be ready and willing to perform his promise, as the allottee had it in his power to decline to complete the contract until he had executed the transfer and the application papers (a). Further, it is not necessary to prove readiness and willingness that the vendor should have made an actual tender to the purchaser of the transfer deed (b). Nor is it necessary that the vendor should have the shares in his possession continuously from the date of the contract down to the time of performance. If a party bound to do an act upon request is ready to do it when it is required he will fully perform his part of the contract, although he might happen not to have been ready had he been called upon at some anterior period (c). But where the purchaser before the day fixed for delivery gives notice to the vendor that he will not accept the shares, the vendor is exonerated from giving proof of his readiness and willingness to deliver the shares (d). And where the vendor of goods repudiates the contract on being called upon for delivery it is enough for the purchaser to prove that he was ready and willing to carry out his part of the bargain, and had made preparations with the object of having the money ready in hand to pay for the goods on delivery. This section does not require him to show that he made an actual tender of the money (e).

Where goods are sold for "cash on delivery," and the vendor delivers a portion of the goods, and the purchaser offers to pay the price thereof if certain cross-claims set up by him are adjusted, it cannot be said that he is not ready and willing to perform his promise, so as to entitle the vendor to refuse delivery of the remaining goods (f).

Inordinate delay on both sides is evidence of the contract being abandoned, and, if that inference is drawn, the contract is enforceable by neither party (g).

(a) *Jivraj Megji v. Poulton* (1865) 2 B. H. C. 253.

(b) *Imperial Banking and Trading Co. v. Pranjivandas Harjivandas* (1865) 2 B. H. C. 258.

(c) *Jivraj Megji v. Poulton* (1865) 2 B. H. C. 253, 256; *Maganbhai Hemchand v. Manabhai Kallianchand* (1866) 3 B. H. C. 79, 86.

(d) *Dayabhai Dipchand v. Maniklal Vrijbhukan* (1871) 8 B. H. C. A. C. 123.

(e) *Shriram v. Madangopal* (1903) 30 Cal. 865.

(f) *Sooltan Chund v. Schiller* (1878) 4 Cal. 255.

(g) *Pearl Mill Co. v. Ivy Tannery Co.* [1919] 1 K. B. 78.

Averment of performance.—According to the common law rules of pleading, where a contract consists of reciprocal promises to be simultaneously performed, neither party to the contract can maintain an action without averring a performance, or an offer to perform, on his own part (*h*); but the necessity for such specific averment has been abolished in England for more than half a century, and now no averment at all of the performance of conditions precedent is required in the first instance in either England (*i*) or India. The English rule of practice has been reproduced here in the Code of Civil Procedure, 1908 (*j*).

52.—Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations.

(a) A. and B. contract that A. shall build a house for B. at a fixed price. A.'s promise to build the house must be performed before B.'s promise to pay for it.

(b) A. and B. contract that A. shall make over his stock in trade to B. at a fixed price, and B. promises to give security for the payment of the money. A.'s promise need not be performed until the security is given, for the nature of the transaction requires that A. should have security before he delivers up his stock.

This section is founded on the same English authorities as s. 51, and on similar reasons, and does not appear to require any further commentary.

53.—When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation

(*h*) 2 Smith L. C. 15. and willingness: *Rawson v. Johnson*
 (*i*) R. S. C., Order XIX, r. 14; 2 (1801) 1 East, 203; 6 R. R. 252.
 Sm. L. C. 16. Under the old rule it (*j*) See Order VI., r. 6.
 was enough to aver substantial readiness

- S. 53. from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration.

A. and B. contract that B. shall execute certain work for A. for a thousand rupees. B. is ready and willing to execute the work accordingly, but A. prevents him from doing so. The contract is voidable at the option of B.; and, if he elects to rescind it, he is entitled to recover from A. compensation for any loss which he has incurred by its non-performance.

Impossibility created by act of party.—This is in substance the rule not only of the Common Law, but of all civilized law (*jj*). No man can complain of another's failure to do something which he has himself made impossible. The principle is not confined to acts of direct or forcible prevention, which are neither frequent nor probable, but extends to default or neglect in doing or providing anything which a party ought under the contract to do or provide, and without which the other party cannot perform his part. A man agrees to sell standing wood; the seller is to cut and cord it, and the buyer to take it away and pay for it. The seller cords only a very small part of the wood, and neglects to cord the rest; the buyer may determine the contract and recover back any money he has paid on account.

"This was an entire contract; and as by the defendant's default the plaintiffs could not perform what they had undertaken to do, they had a right to put an end to the whole contract and recover back the money that they had paid under it; they were not bound to take a part of the wood only" (*k*).

If the prevention by default goes only to one particular term or condition of the contract, the party so prevented from fulfilling that term or condition is entitled to treat it as fulfilled, and insist on payment or other reciprocal performance accordingly; or if there was an agreed penalty in the contract for non-fulfilment, or an option to rescind the contract, the other party cannot take advantage of it. Especially this is the case with stipulations as to the time of

(*jj*) See the rule applied in *Mackay* land.
v. Dick (1881) 6 App. Ca. 251, by the (k) *Giles v. Edwards* (1797) 7 T. R.
 House of Lords on an appeal from Scot. 181; 4 R. R. 414.

completion. "If the party be prevented, by the refusal of the Ss. 53, 54. other contracting party, from completing the contract within the time limited, he is not liable in law for the default" (l).

A railway contractor ordered a steam excavating machine, to be capable of digging a certain quantity of material in a working day, and it was agreed that he was to be bound to accept it only if it performed this on a fair trial at the place where it was to be used. After a partial trial the contractor said the machine had failed, and refused to accept or pay for it. The maker contended that the contractor had himself failed to provide the conditions for a fair trial. This view of the facts was adopted by the Court, and both the Court below and the House of Lords held, as a consequence in law, that the buyer, having by his own fault prevented the application of the test agreed upon, must accept and pay for the machine as if the test had been satisfied. As to the original duty of the buyer to secure the conditions for a fair trial, Lord Blackburn laid down this general rule:—

"Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances" (m).

54.—When a contract consists of reciprocal promises,

Effect of default as to that promise which should be first performed, in contract consisting of reciprocal promises.

such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

(l) *Roberts v. Bury Commissioners* R. R. 647; see per Parke, B., at p. 649. (1869) L. R. 5 C. P. 310, 329; *Holme* (m) *Mackay v. Dick* (1881) 6 App. v. *Guppy* (1838) 3 M. & W. 387; 49 Ca. 251, 263.

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Illustrations.

(a) A. hires B.'s ship to take in and convey from Calcutta to the Mauritius a cargo to be provided by A., B. receiving a certain freight for its conveyance. A. does not provide any cargo for the ship. A. cannot claim the performance of B.'s promise, and must make compensation to B. for the loss which B. sustains by the non-performance of the contract.

(b) A. contracts with B. to execute certain builders' work for a fixed price, B. supplying the scaffolding and timber necessary for the work. B. refuses to furnish any scaffolding or timber, and the work cannot be executed. A. need not execute the work, and B. is bound to make compensation to A. for any loss caused to him by the non-performance of the contract.

(c) A. contracts with B. to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B. engages to pay for the merchandise within a week from the date of the contract. B. does not pay within the week. A.'s promise to deliver need not be performed, and B. must make compensation.

(d) A. promises B. to sell him one hundred bales of merchandise, to be delivered next day, and B. promises A. to pay for them within a month. A. does not deliver according to his promise. B.'s promise to pay need not be performed, and A. must make compensation.

Default of promisor in first performance.—This section completes the declaration of the principles explained under s. 51. In practice the difficulty is to know whether the promises in the case in hand are or are not "such that one of them cannot be performed" etc. One way in which the test is expressed in English authorities is that, if a plaintiff has himself broken some duty under the contract, and his default is such that it goes to the whole of the consideration for the promise sued upon, it is a bar to his suit, but if it amounts only to a partial failure of that consideration, it is a matter for compensation by a cross-claim for damages (n).

Where a contract between a shipowner and a charterer was contained in the following words, "*Hooper* s. to arrive after completion of two country voyages for London on notice in May or June," and the shipowner gave notice after the vessel had completed one voyage only, and the charterer refused to ship the goods, it was held, in a suit by the

(n) See the observations of the Judicial Committee in *Oxford v. Provan* (1868) L. R. 2 P. C. 135, 156.

shipowner for damages for breach of the contract, that the defendant was under the circumstances justified in refusing to perform his promise (o). Garth, C.J., put the decision on the ground that the clause "after completion of two country voyages" was used to indicate to the charterer the time when the ship would be ready, and that it was as essential a part of the contract as any other more direct stipulation as to time (p). Markby, J., however, based his judgment on the fact that this clause constituted a material part of the description of the vessel, and that the ship offered not having completed two country voyages, but only one such voyage, did not answer the description in the contract (q). From either point of view the above clause formed a condition precedent to the performance of the contract by the shipowner, and the case would thus seem to fall under this section, though there is no reference to it in the judgments. Where the condition relates to a supposed existing state of facts, as in *Behn v. Burness* (r), it is not so easy to find the most appropriate section of the Act; but the words of s. 18, sub-s. (3), appear sufficient to cover such a case. In *Simson v. Virayya* (s) the defendant agreed to sell to the plaintiffs 5,000 bags of gingelly seed to be delivered within a specified time. Two-thirds of the price was paid in advance, and it was stipulated that the defendant should give notice to the plaintiffs as instalments of 1,000 bags were ready for delivery, and that the plaintiffs should pay the balance of proportionate price on each instalment when ready for delivery. No delivery was made within the stipulated time, and after the expiration of that period the defendant delivered 3,000 bags to the plaintiffs. The plaintiffs did not pay the proportionate price on those bags when ready for delivery, though required by the defendant, and the defendant thereupon rescinded the contract, and declined to deliver the remaining bags. In a suit for damages by the plaintiffs for non-delivery the Court held, following *Freeth v Burr* (t) and distinguishing *Wilbers v. Reynolds* (u), that the contract

(o) *Fleming v. Kocgler* (1878) 4 Cal. 237.

(p) 4 Cal. p. 247.

(q) *Ib.* p. 251. From this point of view the case was like *Behn v. Burness* (1863) 3 B. & S. 751; 124 R. R. 794, where the description of a ship in a charter-party as "now in the port of

Amsterdam" was held to be "a substantive part of the contract" amounting to a condition.

(r) See note (q).

(s) (1886) 9 Mad. 359.

(t) L. R. 9 C. P. 208.

(u) (1831) 2 B. & Ad. 882; 36 R. R. 782.

54, 55. was an entire one, and that, the payment by the plaintiffs not being a condition precedent to the preparation of the remainder for delivery, the defendant was not justified in rescinding the contract. See the commentary on s. 51, p. 308, above.

55.—When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of failure to perform at fixed time, in contract in which time is essential.

If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of such failure when time is not essential.

It, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

Effect of acceptance of performance at time other than that agreed upon.

Time—when of essence of contract.—In England accidental delays in the completion of contracts for the sale of land within the time named are frequent by reason of unexpected difficulties in verifying the seller's title under the very peculiar system of English real property law. Sharp practice would be unduly favoured by strict enforcement of clauses limiting the time of completion, and

accordingly Courts of Equity have introduced a presumption, chiefly, S. 55. if not wholly, applied in cases between vendors and purchasers of land, that time is not of the essence of the contract. But this presumption will give way to proof of a contrary intention by express words or by the nature of the transaction.

As to contracts for sale of land in British India the Judicial Committee observed in a recent case from Bombay that this section does not lay down any principle which differs from those which obtain under the Law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. Specific performance of a contract of that nature will be granted although there has been a failure to keep the dates assigned by it, if justice can be done between the parties, and if nothing in (a) the express stipulations of the parties, (b) the nature of the property, or (c) the surrounding circumstances make it inequitable to grant the relief. An intention to make time of the essence of the contract must be expressed in unmistakable language; it may be inferred from what passed between the parties before, but not after, the contract is made. The period fixed for completion in that case was two months. The purchaser failed to complete within that period, and subsequently he brought a suit for specific performance against the vendor. Their Lordships held, applying the above principles, that there was no intention that time should be of the essence of the contract, and they decreed specific performance to the purchaser, reversing the decision of the Bombay High Court (v).

There is no place, however, in mercantile contracts for the presumption that time is not of the essence of the contract (w); indeed the Supreme Court of the United States has laid it down broadly that "in the contracts of merchants time is of the essence" (x). This

(v) *Jamshed v. Burjorji* (1916) L. R. 239, 249, per cotton, L.J.

43 I.A. 26, 40 Bom. 289.

(x) *Norrington v. Wright* (1885) 115

(w) *Reuter v. Sala* (1879) 4 C.P. Div. U. S. 189.

8. 55. is especially so as to shipping contracts. As to the sale of goods, "unless a different intention appears by the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract" (y). Generally it is to be observed that in modern business documents men of business are taken to mean exactly what they say. "Merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (z). Parties to mercantile contracts, therefore, cannot rely upon the present section to save them from the consequences of unpunctuality. Thus where the defendant agreed to deliver his elephant to the plaintiff for *khedda* operation (to capture wild elephants) on 1st October 1910, and the defendant subsequently obtained an extension of the time till the 6th October, but did not deliver the elephant till the 11th October, it was held that the very circumstance that the defendant asked for extension of the time showed that time was intended to be of the essence of the contract, and that the plaintiff was therefore justified in refusing to accept the elephant on the 11th October and was entitled to damages for breach of the contract (a). Where a contract for the sale of goods provides for delivery to be taken by the buyer within a specified period, and reserves liberty to the seller, if delivery is not taken within the fixed period, to sell the goods on the buyer's account and at his risk, the mere fact that the contract contains a clause that after the expiry of that period the goods shall remain at the buyer's risk will not take the case out of the general rule that in mercantile contract time is of the essence of the contract (b).

Either party's general right to have the contract performed within a reasonable time according to the circumstances is of course unaffected by the fact of time not being of the essence; and in case of unnecessary delay by one party the other may give him notice fixing a reasonable time after the expiration of which he will treat the

(y) Sale of Goods Act, 1893, s. 10. 22 Cal. L. J. 566.

(z) Lord Cairns in *Bouces v. Shand* (b) *Delhi Cloth Mills Co., Ltd. v. Kanhia* (1913) Punj. Rec. no. 80, p. 235.

(a) *Bhudar Chandra v. Betts* (1915)

contract as at an end (c); and where there has been inordinate delay on both sides it may be inferred that the contract has been abandoned, although no such notice has been given (d). Also parties may bind themselves to use special diligence in completion, without naming any particular date, for example, by the words "as soon as possible," which means within a reasonable time, with an undertaking to do the thing in the shortest practicable time, according to the usual course of properly conducted business (e).

The section applies to all cases of reciprocal promises, including contracts for the sale of goods whether the property in the goods sold has or has not passed to the purchaser. Thus in a Calcutta case (f) where time was of the essence of the contract, and the vendor rescinded the contract, it was contended for the buyer that, the property in the goods sold having passed to him, this section did not apply, and the vendor was not entitled to put an end to the contract, but that his only remedy was to resell the goods under s. 107. It was held that s. 107 declared only one of the remedies which the vendor had on breach of the contract by the purchaser, and that the vendor was entitled to the benefit of s. 55.

It would seem that the provisions of this section apply to consent decrees (g).

"*The contract becomes voidable at the option of the promisee.*"—A. agrees to sell and deliver 6 bales of cotton to B. on 12th July 1909. A. fails to deliver the goods on 12th July. On 4th September 1909 B. writes to A. stating that if A. failed to deliver the cotton within a week, he will claim damages according to the market rate at the date of the letter. A. takes no notice of this letter. On 3rd October 1909 B. writes another letter to A. stating that as A. had failed to

(c) *Stickney v. Keeble* (1915) A. C. 386. On the other hand a party to a contract in which time is of the essence may be entitled to relief against forfeiture of payments already made, on proper terms, although not entitled to specific performance: *Steedman v. Drinkle* (1916) A. C. 275 (J. C.).
(d) *Pearl Mill Co. v. Ivy Tannery Co.* (1919), 1 K. B. 78. All the circum-

stances must of course be considered.

(e) *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q. B. Div. 670, 673.

(f) *Buldeo Doss v. Howe* (1880) 6 Cal. 64.

(g) See *Bhagwant Gopal v. Appaji* (1916) 18 Bom. L.R. 803; *Parbhu Ram v. Jhalo Kuer* (1917) 2 Pat. L. J. 520, 522.

ss. 55, 56. deliver the goods, he would claim damages on the footing of the market rate at the date of the second letter. B. is not entitled to damages on that footing, but to the difference between the contract rate and the market rate on 12th July 1909, the latter being the date of the breach. The present section does not enable a promisee to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. It is immaterial that no notice was given by A. to B. that the contract was at an end (*h*).

56.—An agreement to do an act impossible in itself is void.

Agreement to do impossible act.

Contract to do act afterwards becoming impossible or unlawful.

A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Compensation for loss through non-performance of act known to be impossible or unlawful.

Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

Illustrations.

(a) A. agrees with B. to discover treasure by magic. The agreement is void.

(b) A. and B. contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.

(c) A. contracts to marry B., being already married to C., and being forbidden by the law to which he is subject to practise polygamy. A. must make compensation to B. for the loss caused to her by the non-performance of his promise.

(d) A. contracts to take in cargo for B. at a foreign port. A.'s Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

(e) A. contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A. is too ill to act. The contract on those occasions becomes void.

(h) *Muthaya Maniagaran v. Lekku* (1914) 37 Mad. 412.

Impossibility in general.—Nothing resembling this section S. 56. has been found among the materials known to have been used by the framers of the Act. It varies the Common Law to a large extent, and moreover the Act lays down positive rules of law on questions which English and American Courts have more and more tended, during the last quarter of a century or longer, to regard as matters of construction depending on the true intention of the parties. English authorities, therefore, can be of very little use as guides to the application of this section.

With regard to the first paragraph, the result is the same as in England. In the Common Law we may say that parties who purport to agree for the doing of something obviously impossible must be deemed not to be serious, or not to understand what they are doing; and also that the law cannot regard a promise to do something obviously impossible as of any value, and such a promise is therefore no consideration. "Impossible in itself" seems to mean impossible in the nature of things. The case of performance being, at the date of the agreement, impossible by reason of the non-existence of the subject-matter of the contract has been dealt with under the head of Mistake (s. 20).

The second paragraph has the effect of turning limited exceptions into a general rule. By the Common Law a man who promises without qualification is bound by the terms of his promise if he is bound at all. If the parties do not mean their agreement to be unconditional, it is for them to qualify it by such conditions as they think fit. But a condition need not always be expressed in words; there are conditions which may be implied from the nature of the transaction; and in certain cases where an event making performance impossible "is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made" (i) performance or further performance of the promise, as the case may be, is excused. On this principle a promise is discharged if, without the promisor's fault, (1) performance is rendered impossible by law (i); (2) a specific subject-matter assumed by the parties to exist or continue in existence is accidentally destroyed

(i) *Baily v. De Crespigny* (1869) L. R. 4 Q. B. at p. 185.

- S. 56. or fails to be produced (*j*), or an event or state of things assumed as the foundation of the contract does not happen or fails to exist, although performance of the contract according to its terms may be literally possible (*k*); (3) the promise was to perform something in person, and the promisor dies or is disabled by sickness or misadventure (*l*).

In the last-named class of cases a disabled promisor must give the best practicable notice to the promisee, and the promisee has the reciprocal right of rescinding the contract if it is a continuing contract, and the disability makes it as a whole impossible of performance, though some part might afterwards be performed; this on the ground not of breach of contract, which there has not been, but that the consideration has failed. In such a case the promisor cannot show that he was ready and willing to perform his promise (*m*). These rules have no bearing on cases where the parties have contemplated and provided for the contingency. In such cases the Court has only to construe the terms of their agreement (*n*).

Having regard to the unqualified language of the Act, it seems useless to enter at more length on the distinctions observed in English law. The illustrations do not, indeed, appear to go beyond English authority, but this cannot detract from the generality of the enacting words. There is no reason to suppose that a broad simplification of the English rules was not intended, nor does it appear that any inconvenience has ensued or is to be expected. It is to be observed, on the other hand, that some of the English cases could not be decided in the same way under this section without straining the language. *H.* agreed to hire the use of *K.*'s rooms in London on the days of June 26th and 27th, 1902, for the purpose of seeing the intended coronation processions. By reason of the King's illness no procession

(*j*) *Taylor v. Caldwell* (1863) 3 B. & S. 826; 129 R. R. 573; *Howell v. Coupland* (1876) 1 Q. B. Div. 258. (l) *Robinson v. Davison* (1871) L.R. 6 Ex. 269.
 (*k*) *Krell v. Henry* [1903] 2 K. B. 740 C. A. But failure of a condition which the parties did not know of, and therefore cannot have regarded as material, will not discharge the contract; *Blackburn Bobbin Co. v. T. W. Allen & Sons* [1918] 2 K. B. 467 C. A.
 (*m*) *Poussard v. Spiers & Pond* (1876) 1 Q. B. Div. 410.
 (*n*) *Elliott v. Crutchley* [1904] 1 K. B. 565 C. A., affirmed in H. L. [1906] A. C. 7.

took place on either of those days. It was held that K. could not recover the balance of the agreed rent, as the taking place of the processions "was regarded by both contracting parties as the foundation of the contract" (o). Here it remained quite possible for K. to lease the use of the rooms to H., and for H. to use them; it was only the object of the act contracted for that had failed, and that object was not mentioned in the contract itself, though H. took the rooms in consequence of seeing an announcement posted up in them that windows to view the coronation processions were to be let. In India such a case would perhaps fall more appropriately under s. 32. Illustration (a) raises a curious little question. If A. agrees with B. to discover by magic a treasure supposed to be buried within certain limits at a spot not exactly known, and, after performing magic rites, does by good fortune discover the treasure, and A. and B. both believe that the magic was efficacious, can A. recover any reward from B., and if so under the agreement by rejecting the specification of means to be employed as immaterial, or under s. 70 of the Act, or how otherwise?

Frustration of Adventure—War conditions.—The English rules as to discharge of contracts by "frustration of adventure" (a term chiefly used in shipping cases, with "frustration of voyage" as a synonym) have been applied in new directions in cases arising out of the War of 1914. A full account is impracticable here (p). Recent authority, however, has made it clearer than ever that the literal possibility or otherwise of executing the agreement according to its terms is not an adequate test; it has to be considered whether performance according to the true governing intention of the parties remains possible, and for this purpose the Courts regard the duration of war as an indefinite time (q). But a temporary interruption (such as requisition of a ship for transport of troops) does not necessarily determine the contract (r). However, the extension of the former rules by *Krell v. Henry* (see above) now stands as applicable to

(o) *Krell v. Henry* [1903] 2 K. B. 740 pp. 70, 265 sqq., 284 sqq.

(p) For details see H. Campbell, *The Law of War and Contract*, (London, Bombay, &c., Oxford Univ. Press, 1918) (q) *Horlock v. Beal* [1916], 1 A.C. 487.
(r) *Tamplin S. S. Co. v. Anglo-Mexican &c. Co* [1916] 2 A. C. 397.

8. 56. contracts of all sorts within limits not yet thoroughly defined, as McCardie, J., has pointed out in a careful analysis (s).

Frustration by Total or Partial Prohibition.—In a state of war many contracts are affected by performance or further performance becoming wholly or in part unlawful. This may be under the general rules against intercourse with the enemy, or may be the result of express executive orders issued under powers of emergency legislation. In principle the question is the same that we have noted above, whether the new state of things is such as the parties provided for or contemplated, and whether further performance, so far as the prohibition is not total, or when it is removed, would really be performance of the same contract. Compulsory suspension of an engineering contract on a large scale, in order to direct the labour to producing munitions of war, has been held to discharge the contractors (t). Where goods, the subject of a specific contract of sale, in which the property had not yet passed to the buyer, were lawfully taken for the public service, the seller was excused from delivery (u). But a continuing contract is not discharged by a prohibitive regulation which may be determined or varied during the war and leaves a substantial part of the contract capable of execution (v).

It must not be assumed that the consequences of a contract being discharged for any of the abovementioned reasons will be the same in India as they would have been in England; see on s. 65 below.

“Becomes impossible.”—The Indian decisions merely illustrate what amounts to supervening impossibility or illegality within the meaning of the second paragraph.

In a suit for damages for breach of a contract against a Hindu father to give his minor daughter in marriage to the plaintiff, it was held that the performance of the contract had not become impossible simply because the girl had declared her unwillingness to marry the

(s) *Blackburn Bobbia Co. v. T. W. Kerr & Co.* [1918] A. C. 119.
Allen & Sons [1918] 1 K. B. 540, 545. (u) *Re Shipton, Anderson & Co.* and
 It does not extend to a bare sale of un- *Harrison Bros. & Co.* [1915] 3 K. B. 676.
 ascertained goods; see at p. 550: *affd.* (v) *Leiston Gas Co. v. Leiston-cum-*
in C. A. [1918] 2 K. B. 467. *Sizewell Urban Council* [1916] 2 K. B.
 (t) *Metropolitan Water Board v. Dick* 428 A. C.

plaintiff, and the defendant had declared that he could not compel her to change her mind (*w*). In the course of the judgment the Court said: “The act is neither impossible in itself, nor impracticable in the ordinary sense of the term.... Though physical force cannot for one moment be thought of, it is no doubt the duty of defendant according to the terms of his contract to use to the utmost his persuasive powers and his position as parent in order to induce his daughter to be married.” More generally, if a man chooses to answer for the voluntary act of a third person, and does not in terms limit his obligation to using his best endeavours, or the like, there is no reason in law or justice why he should not be held to warrant his ability to procure that act. Similarly, where the parties to a suit agreed that the plaintiff and his younger brother were to execute a sale deed within a week conveying the property in dispute in the suit to the defendant for a certain sum, and, in default, the suit was to be dismissed, it was held that the younger brother’s refusal to join in executing the deed did not make the performance of the agreement by the plaintiff impossible within the meaning of this section (*x*). Where A. agreed to cultivate indigo for B. for a certain number of years in certain lands of which A. was a sub-tenant, and subsequently during the continuance of the contract A. lost possession of the lands, as his immediate landlord failed to pay rent, and was in consequence ejected, it was held that the case came within the provisions of the second paragraph of this section, and that the mere fact that A. might have paid up the rent and thus saved the land and himself as his tenant from ejection did not make the event such an one as A. could have prevented (*y*).

In a Bomhay case (*z*), the defendant, who was a stone contractor, agreed to pay to the plaintiff Rs. 329 per month for one year for permission to the defendant to blast stones and carry on the work of quarrying on plaintiff’s land. It was also agreed that the defendant should obtain at his own expense the necessary license for blasting stones. At the time of the agreement the defendant had a license

(*w*) *Purshotamdas Tribhovandas v. Inder Pershad Singh v. Campbell Purshotamdas Mangaldas* (1898) 21 (1881) 7 Cal. 474.

Bom. 23.

(*z*) *Goculdas Madhavji v. Narsu*

(*z*) *Rangaswami v. Trisa Maistry Yenkuji* (1889) 13 Bom. 630.
(1907) 17 Mad. L. J. 37.

S. 56. from the authorities, but it expired during the term of the agreement, and the authorities refused to renew it; the defendant thereupon declined to pay the rent for the unexpired period of the agreement. In a suit by the plaintiff for the rent it was held that the question was one of construction, and that, looking at the nature of the contract, it must be taken to have been the intention of the parties that the monthly payment should only be payable so long as quarrying was permitted by the authorities. The present section was considered to have nothing to do with the case (a). Obviously the performance did not become impossible, as there was no agreement to blast any stone at all.

Commercial impossibility.—The impossibility referred to in the second clause of this section does not include commercial impossibility. A contract therefore to supply freight cannot be said to become impossible within the meaning of that clause merely because the freight could not be procured except at an exorbitant price (b).

“Becomes unlawful.”—By a contract made with the plaintiffs the defendants agreed to carry from Bombay to Jedda in their steamer 500 pilgrims who were about to arrive in Bombay from Singapore in the plaintiff's ship. The pilgrims arrived in Bombay, but the defendants refused to receive them on board their steamer on the ground that during the voyage of the plaintiffs' ship to Bombay there had been an outbreak of small-pox on board, and that the pilgrims had been in close contact with those who had been suffering from the disease, and that the performance of the contract had under the circumstances become unlawful, having regard to the provisions of s. 269 of the Indian Penal Code (Act XLV of 1860). That section provides that whoever unlawfully and negligently does any act which is, or which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment. It was held that the carrying of the pilgrims in the defendants' steamer would not have been in contravention of any law or regulation having the force of law, nor would it have been a negligent act on their part to do so, and that s. 269, therefore, did

(a) 13 Bom. at p. 635, Sargent, C.J., arg.

(b) *Karl Ettlinger v. Chagandas* (1916) 40 Bom 301, 310-311.

not apply, and that the defendants were bound to perform the contract (c).

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Certain later statutory enactments further define the effect of the present section. The Specific Relief Act I of 1877, s. 13, provides that, notwithstanding anything contained in s. 56 of the Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance. The Transfer of Property Act IV of 1882, s. 108, provides as to property let on lease, that if by fire, tempest, or flood, or violence of an army or of a mob, or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void.

Refund.—Where a contract, after it is made, becomes impossible, the party who has received any advantage under it is bound to restore it to the other party under s. 65 below. A buys freight from B, for 2,500 bales of cotton on a ship belonging to B, to be carried from Bombay to Genoa. The freight is paid in advance and the goods are put on board the ship. While the ship is still lying in the harbour, the export of cotton to Genoa is prohibited by orders of the Government, and the voyage is abandoned. A is entitled under s. 65 to recover from B the freight paid in advance. This right is not affected even if B is a common carrier (d). Similarly, where a contract becomes unlawful owing to the outbreak of war, either party is entitled under s. 65 to recover from the other any deposit made by him as a security for the due performance of the contract (e).

Dealings with Enemies.—Since 1914 the question has often arisen whether a contract lawfully made before the war comes within this section on the ground that performance or complete performance would involve dealing (f) with enemies and therefore

(c) *Bombay and Persia Steam Navigation Co., Ltd. v. Rubattino Co., Ltd.* (1889) 14 Bom. 147.

(d) *Boggiano & Co. v. The Arab Steamers Co., Ltd.* (1916) 40 Bom. 529.

(e) *Textile Manfg. Co., Ltd. v. Solomon Brothers* (1916) 40 Bom. 570.

(f) "Trading" is too narrow: "a de-

claration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country:" judgment of Ex. Ch. per Willes, J., *Esposito v. Bowden* (1857) 7 E. & B. at p. 779, 110 R. R. at p. 823.

56. would be unlawful under s. 23. A large proportion of these cases are on contracts "for the sale of goods to be performed by the delivery of documents" (g) in the form known as "c.i.f." For the reader's convenience an authoritative statement of what that form implies is subjoined in a note (h).

The governing principle was laid down in a case arising out of the Crimean War by Mr. Justice Willes: "As to the mode of operation of war upon contracts of affreightment made before, but which remain unexecuted at, the time it is declared, and of which it makes the further execution unlawful or impossible, the authorities establish that the effect is to dissolve the contract, and to absolve both parties from further performance of it" (i). In practice we have to ascertain whether the further execution of a given contract has become unlawful as involving dealing with enemies, or otherwise, or in a judicial sense impossible; and this is not always easy. Declaration of war is regularly accompanied by a Royal Proclamation against trading with the enemy. This appears to be only in affirmance of the common law; it may however and commonly does contain relaxations and dispensations. After a declaration of war a contract may stand dissolved on the ground now under consideration although both

(g) *Bankes, L.J., Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K. B. at p. 510, op. Warrington, L.J., p. 514.

(h) "A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract; secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract; thirdly to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly to make out an invoice as described by Blackburn, J., in *Ireland v. Livingston* (L. R. 5 H. L. at p. 506) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has

to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods, provided they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, the bill of lading, invoice, and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price. In this case payment before the arrival of the goods in this country was involved": Per Hamilton, J., now Lord Sumner, *Biddell Bros. v. E. Clemens Horst Co.* [1911] 1 K. B. at p. 220.

(i) *Esposito v. Bowden*, 7 E. and B. at p. 783, 110 R. R. at p. 825.

parties are British subjects. One British firm contracted with another to sell goods, deliverable to the buyer or assigns in Hamburg c.i.f. for payment at Liverpool in exchange for shipping documents. The goods were shipped in June 1914 for Hamburg in a German ship; the bill of lading provided that questions arising under it were to be decided there by German law. On August 5, the day following the declaration of war, the ship having put in, it was stated, at a neutral port, the sellers tendered the documents and the buyers refused them. Held that delivery according to the contract would have been against the King's proclamation, as being delivery to residents in enemy country, and therefore the refusal was good (*j*).

This authority has been followed in Indian cases where the facts were varied by the goods being despatched, or intended so to be, not to Germany but from Germany to India. We have the simple case of a cargo shipped from Hamburg to India, bill of lading tendered after British proclamation, tender justified, (*k*) the goods having become enemy property at the outbreak of war. Another straightforward example is that of a consignment sold by the Madras agent of an enemy firm: the buyer accepted a draft for the price, and demanded first the documents and then the goods on arrival at Madras: the agency was held to have been determined by the declaration of war, so that no contract was ever formed (*l*).

A less simple question is "whether when, before the outbreak of war, goods have been sold by one English firm to another on a c.i.f. contract and shipped on a German ship to a neutral port, the seller after the outbreak of the war is entitled to tender, in one case the German bill of lading, in the other case the German bill of lading and the German policy of insurance, and claim the price" (*m*). The exact legal point as stated in the Court of Appeal is "upon whom the loss is to fall where documents which were originally valid have become invalid before they were tendered" (*n*). It is decided in England that the documents the buyer is bound to accept are effective shipping

(*j*) *Duncan Fox & Co. v. Schremppft & Bonke* [1915] 1 K. B. 365.

(*k*) *Nissim Isaac v. Haji Sultanali* (1916) 40 Bom. 11.

(*l*) *Soorthingje v. Mahomed* (1917) 32 Mad. L. J. 146.

(*m*) *Scrutton, J., Schneider & Co. v. Burgett & Newnam* [1915] 2 K. B. at p. 385.

(*n*) *Swinfen Eady, L.J., Karberg & Co. v. Blythe, Green, Jourdain & Co.* [1916] 1 K. B. 495, 504.

8. 56. documents, and not such as are only evidence of a contract now dissolved by one party having become an alien enemy. Special terms might throw this risk on the buyer, but the usual terms of a c.i.f. contract do not. This ruling has been followed in India. In *Marshal & Co. v. Naginchand* (o) goods were shipped to Bombay under a c.i.f.c.i. contract from a German port and on board a German ship before the declaration of war: the vendor, a Glasgow firm, drew a bill of exchange upon the purchaser on November 9th, 1914, which was accepted in Bombay (p). The bill became payable on January 12th, 1915, and the vendor sued for the amount. He was held not entitled to recover, as the bill of lading had ceased to be an operative legal document before it was tendered and the consideration for the acceptance of the bill of exchange had therefore failed.

Where, on the other hand, a German seller's draft on the buyer at 30 days' sight was drawn, purchased by British subjects in London, and presented and accepted at Bombay before the war, the buyer was held bound to pay (q). The case was complicated by the defendants' contention that the acceptance was qualified by the condition that the plaintiffs, when tendering the documents to the defendants, should put them in a position to get delivery of the goods, (r) and that this could not be lawfully performed. Now in point of fact the ship carrying the goods reached Bombay just before the outbreak of war, left Bombay to avoid capture and took shelter in the neutral port of Marmagao, where she was lying at the date of suit brought, and under a proclamation of December 1914 British consignees were free to take delivery of goods from enemy ships in neutral ports. Thus both branches of the defence failed: actual payment of the bill, from one British subject to another, at the due date and after declaration of war, was of course in no way unlawful.

In *Abdul Razac v. Khandi Row* (s) a contract was made in August 1914, after the outbreak of war, between merchants at Ambur and

(o) (1916) 42 Bom. 473.

cantile Bank of India (1917) 41 Bom. 566.

(p) It is not clear from the report whether the bill of lading was tendered to the purchaser at the time of acceptance or subsequently, nor whether he ever got the bill of lading.

(r) It is difficult to see how this could be maintained: but, as pointed out by Scott, C.J., that question would have been governed by the Negotiable Instruments Act.

(q) *Motiahaw & Co. v. The Mer-*

(s) (1918) 41 Mad. 225.

importers of German dyes whereby the latter (defendants) agreed to sell and deliver to the former (plaintiffs) certain casks of dye already shipped from Germany. As the defendants could not lawfully take up and pay for the goods, they could not lawfully agree to sell and deliver them to the plaintiffs (*l*). The case has another aspect, perhaps of more interest. The German S. S. *Barenfels* carrying the dyes in question was captured in October 1914 and taken into Alexandria for condemnation and subsequently condemned as prize of war in September 1915 (*u*). In the meantime the defendants got the goods released on payment of double the invoice value, agreeing to treat it as their sale price in case of their eventual condemnation. It was held (*v*) that the condemnation by the Prize Court related back to the date of seizure and divested the ownership of the goods as from that date. The goods therefore came to the defendants as purchasers from the Crown and they were not bound to deliver them to the plaintiffs.

In *Madhoram v. Sett* (*w*) we have a rather peculiar state of facts. The contract was between two Calcutta firms for sale of steel bars "e.i.f.i.e. free Hooghly" by shipments in June, July, August 1914. Goods were shipped under this contract (*x*) from Antwerp per S.S. *Steinturm*, a German ship which was at sea when war was declared; she carried a general cargo for Madras, Calcutta and Chittagong. The ship was captured by a British cruiser and taken to Colombo for adjudication. The Prize Court condemned the vessel but released the cargo, and the goods were brought to Calcutta, the place where the

(*l*) *Karberg's* case, above. It was unsuccessfully contended that there was an absolute contract for the delivery of goods answering the description even if no such goods arrived by a ship named (the report is not too clear as to this argument).

(*u*) The Prize Court in Egypt held in the same case, that where a German firm consigned goods to a British firm at Colombo drew on that firm for the price, and discounted the draft with a British bank, all this before the war, acceptance of the draft after the war by the buyers was an act of trading with

the enemy: see Campbell on the Law of War and Contract, 175, 187. We agree with Mr. Campbell that this goes too far.

(*v*) Following *The Odessa* [1916] A. C. 153.

(*w*) (1918) 45 Cal. 28.

(*x*) The terms were, not payment against documents, but 45 days' credit after delivery of the goods: this variation did not alter the nature of the contract, apparently the only real difference between the parties related to payment of various charges.

56, 57. goods were to be delivered under the original contract, by the *Steinturm*, under an order of the Prize Court made by arrangement with the Government of Ceylon, which provided for delivery to consignees on payment of further freight and expenses. The purchasers were held not entitled to delivery of the goods from the vendors. The voyage from Colombo to Calcutta was in no sense a continuation of the original voyage in fulfilment of the contract of affreightment, which was dissolved by the outbreak of the war; the voyage was broken up by capture so as to cause a complete defeasance of the undertaking, "The original bills of lading would be of no avail whatever, unless the consignee complied with the conditions imposed by the Prize Court" (y). Thus there was a new voyage under new conditions, and delivery of the goods according to the original contract had become impossible, and the plaintiffs' suit failed, although the goods had been delivered in the *Hoogly* from the same ship in which they were dispatched, and were in the defendants' control.

57.—Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Reciprocal promise to do things legal, and also other things illegal.

Illustration.

A. and B. agree that A. shall sell B. a house for 10,000 rupees, but that, if B. uses it as a gambling house, he shall pay A. 50,000 rupees for it.

The first set of reciprocal promises, namely, to sell the house, and to pay 10,000 rupees for it, is a contract.

The second set is for an unlawful object, namely, that B. may use the house as a gambling house, and is a void agreement.

Scope of the section.—It is not easy to see what this and the following section really add to s. 24 (see the commentary thereon for explanation of the principle), or why they are inserted here; but they are plain enough.

This section applies to cases where the two sets of promises are distinct. When the void part of an agreement can be properly

(y) Per Mookerjee, J., 45 Cal. at p. 58.

separated from the rest, the latter does not become invalid; but when the parties themselves treat transactions, void as valid, as an integral whole, the Court also will regard them as inseparable, and wholly void (z). Sa. 57½

Compare s. 16 of the Specific Relief Act: "When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the Court may direct specific performance of the former part."

58.—In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Alternative promise, one branch being illegal.

Illustration.

A. and B. agree that A. shall pay B. 1,000 rupees, for which B. shall afterwards deliver to A. either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

Quære whether, under the terms of this section, in case B. has offered and A. has accepted smuggled opium as in performance of the agreement, A. can still have an action against B. for failure to deliver rice. It would seem that A., being *in pari delicto*, cannot sue; for he could not make out his case without showing an illegal transaction to which he was a party (a). The point does not seem likely to arise in practice.

Appropriation of Payments.

59.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Application of payment where debt to be discharged is indicated.

(z) *Davlatling v. Pandu* (1884) (1905) 7 Bom. L. R. 602, at p. 606.
 9 Bom. 176. See also *Poonoo Bibee v. Fyez Buksh* (1874) 15 P. L. R. App. 5 *(a)* See *Taylor v. Chester* (1869) L. R. 4 Q. B. 309, 314.
 and *Meherally v. Sakerhanoojai*

Illustrations.

(a) A. owes B., among other debts, 1,000 rupees upon a promissory note, which falls due on the 1st June. He owes B. no other debt of that amount. On the 1st June A. pays to B. 1,000 rupees. The payment is to be applied to the discharge of the promissory note.

(b) A. owes to B., among other debts, the sum of 567 rupees. B. writes to A. and demands payment of this sum. A. sends to B. 567 rupees. This payment is to be applied to the discharge of the debt of which B. had demanded payment.

Appropriation of Payments.—In England “it has been considered a general rule since *Clayton's Case* (b) that when a debtor makes a payment he may appropriate it to any debt he pleases, and the creditor must apply it accordingly” (c).

Debt.—Where money is paid by a debtor to his creditor with express intimation that the payment is to be applied to his discharge of some particular debt, and it is received and appropriated on that account, it is not in the power of the creditor, without the assent of the debtor, to vary the effect of the transaction by altering the appropriation in which both the debtor and the creditor originally concurred. The same rule applies to payment of Government revenue (d). But where there is no appropriation by consent, the question arises whether the provisions of sections 59—61, relating to the appropriation of payments, which apply to the case of debts, apply to arrears of revenue payable to Government. Maclean, C.J., has expressed the opinion that sections 59—61 of this Act do apply to transactions in relation to the realization of land revenue (e). The point arose in a recent case before the Privy Council, but it was not decided, as the case was one of appropriation by mutual consent, their Lordships simply observing that those sections *might perhaps have had a bearing upon the case*, if the parties had not by their own

(b) (1816) 1 Mer. at p. 608; 15 R. R. at p. 166.

(c) Per Blackburn, J., *City Discount Co. v. McLean* (1874) L. R. 9 C. P. 692, 700. A case of *Davenport v. Rigg*, decided by the Judicial Committee in 1877 (3 App. Ca. 115), which we have seen cited on this section, has, in the present writer's humble opinion, nothing

whatever to do with it. The subject-matter is the effect of a landlord's receipt of rent, and the analogy, if any, is remote.

(d) *Mahomed Jan v. Ganga Bishun Singh* (1910) 38 Cal. 537; 38 I. A. 80, reversing S. C. in 33 Cal. 1193.

(e) *Jogendra Mohan Sen v. Uma Nath Guha* (1906) 35 Cal. 636.

actions placed the matter beyond doubt (*f*). As to road-cess payable under the Public Demands Recovery Act (*g*), it has been held that it is a debt within the meaning of this section, and that the collector therefore has no authority to appropriate payments made in liquidation of *specific* arrears of road-cess towards previous arrears (*h*).

Several distinct debts.—This section deals only with the case of several distinct debts, and does not apply where there is only one debt, though payable by instalments. Thus where the amount of a decree was by consent made payable by five annual instalments, it was held that the decree-holder was not bound to appropriate the payments to the specific instalments named by the judgment debtor (*i*). The amount declared to be due for principal, interest and costs in a mortgage suit under O. 34, r. 4, constitutes but one debt; it cannot be regarded as consisting of two debts, one on account of principal and interest and the other on account of costs (*j*).

60.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

Application of
payment where
debt to be dis-
charged is not
indicated.

Creditor's right to appropriate.—“If the debtor does not make any appropriation at the time when he makes the payment the right of application devolves on the creditor,” and he may exercise that right until the very last moment, and need not declare his intention in express terms (*k*); he may, indeed, exercise that right even when he is being examined at the trial of the case (*l*). This is, no doubt, the rule of English law, and it was assumed to be the law under the

(*f*) *Mahomed Jan v. Ganga Bishun Singh* (1910) 38 Cal. 537, 541; 38 I.A. 80, 84. (*j*) *Jagannath v. Jhunia* (1914) 12 All. W. N. 645.

(*g*) Act I of 1895, Beng. Code. (*k*) Lord Macnaghten in *Cory Bros. & Co. v. Owners of the "Mecca"* (1897)

(*h*) *Nandan Missir v. Lala Harakh Narain* (1910) 14 C. W. N. 607. A. C. 286, 293.

(*i*) *Fazal Husain v. Jivan Ali* (1906) All. W. N. 135. (*l*) *Seymour v. Pickett* (1905) 1 K. B. 715.

- S. 60. Contract Act by the High Court of Bombay (*m*), and the Patna High Court (*n*). In the last mentioned case Atkinson, J., said: "I only refer to the case of *Cory Bros. & Co. Ltd. v. The Mecca* (*o*) for the purpose of showing that the law there laid down is in conformity in every respect with the enactment contained in sections 60 and 61 of the Indian Contract Act." But the High Court of Allahabad has held that an appropriation of payment by the creditor must be made *at the time of receiving the money*, and that he cannot exercise the right of appropriation at the very last moment (*p*). After referring to the passage in the judgment of the Master of the Rolls in *Clayton's case* (*q*) relating to the Civil Law on the subject, the learned Judges observed: "It seems to us that what the Indian Legislature did by sections 59-61 of the Indian Contract Act was to adopt the rule of Civil Law with certain modifications. Unless the meaning of section 60 is that the debtor is to make his appropriation (if any) at the time of paying and the creditor is to make his appropriation (if any) at the time of receiving the money, it is difficult to conceive what is the meaning of section 61 or how it could be applied." It is no doubt true that according to the Civil Law an appropriation of payment by the creditor must be made at the time of receiving the money, but there is nothing in the language either of s. 60 or s. 61 which precludes the creditor from exercising the right of appropriation at the very last moment. It is submitted, with respect, that the view taken by the Allahabad High Court is an arbitrary speculation. It seems to assume that if the creditor has the right as in English law to make the appropriation at the last moment, he will do so in every case, and that there can therefore be no room for the operation of s. 61. But the creditor may do nothing at all, in which case a rule is necessary for the guidance of the Courts, and s. 61 provides such a rule. The rule laid down in s. 61 is in conformity with the English law.

(*m*) *Amerchand & Co. v. Ranchis* (1914) 38 Bom. 255, 264-265. The case was taken in appeal to the Privy Council [L. R. 43 I. A. 164, 40 Bom. 630], but the judgment of the High Court on this point was not challenged in argument.

(*n*) *Bishun Perkash v. Siddique* (1916) 1 Pat. L. J. 474.
 (*o*) (1897) A. C. 286.
 (*p*) *Kundan Lal v. Juganath* (1915) 37 All. 649.
 (*q*) (1816) 1 Mer. 604.

It is impossible to define the circumstances which may be held to indicate a special intention (r). Where the earlier in date of two debts is of a different kind and specially secured, it will not be presumed that a payment made without express directions was intended to be on account of the earlier one (s).

When a debtor passed two mortgage bonds to his creditor, one of which carried interest payable with rests, and the other carried simple interest, and the creditor appropriated payments made by the debtor to interest on the bond carrying simple interest, it was held that the creditor was entitled to apply the payments to either of the debts, and that the mere reluctance of the debtor to pay compound interest before he executed the mortgage bond at such interest was no indication of the debtor's intention that his payments should be applied to that bond (t). But where by a mortgage bond the debtor agreed to repay the loan made to him by the creditor in kind by delivery of certain species of grain, or at his option in cash at a specified rate of interest, and the creditor applied several payments in grain made by the debtor to other antecedent debts, it was held that the creditor was not entitled to do so, as the stipulation to repay the loan by delivery of grain, combined with the absence of evidence to show that the previous debts were to be liquidated by payments of grain, was a circumstance indicating that the payment was to be applied to the debt secured by the mortgage bond (u).

Under this section the creditor has a discretion to appropriate a payment by a debtor either to the principal or the interest of his debt. It is for the debtor to show that he had acted in such a way in respect of the payment as to limit the discretion of the creditor (v). As stated by the Judicial Committee, "unless the [debtor] could satisfy [the Court] that there had been an appropriation at the

(r) See *Bansi Dhar v. Akhya Ram* (1890) All. W. N. 62, where the terms of the mortgage bond, the circumstances in which it was executed, the relations of the parties and the fact that the very thing which was to be handed over to the creditor was to be given as part security for the debt, were held to constitute "circumstances" within the mean-

ing of this section.

(s) *City Discount Co. v. McLean* (1874) L. R. 9 C. P. 692, 700.

(t) *Rameswar Koer v. Mahomed Mehdi Hossein Khan* (1898) 26 Cal. 39.

(u) *Sungut Lal v. Baijnath Roy* (1886) 13 Cal. 164.

(v) *Nirpat v. Shadi* (1881) All. W. N. 119.

S. 60, time of payment to the payment off of the principal, the creditor had a right to consider it as a payment on account of the interest" (w). "It appears to be a well-settled practice of the Courts to appropriate payments made upon a bond first to the interest due thereon, and thereafter, if any balance remains, to the principal" (x). The same rule applies to judgment debts. Thus when a sum is realised on account of a decree, that amount is to be deducted from the interest and not from the principal (y). The rule is the same even if the decree be an instalment decree. Thus if a decree is passed for Rs. 1,500 with interest at five per cent. per annum payable by three yearly instalments of Rs. 500 each, and the judgment-debtor pays Rs. 500 at the end of each of the three years without appropriating the payments to principal, the decree-holder is entitled to appropriate Rs. 75 for the interest due and the balance of Rs. 425 to principal (z).

Where a payment is made by way of dividend or composition for the benefit of creditors generally, the payments must, by the nature of the transaction, be rateably apportioned among the several debts; and in any question arising with third parties, as, for example, sureties for any portion of the debts, every payment is deemed to be specifically appropriated "as so much in each and every pound of the whole amount of the debt" (a). See further, as to the result of this, on ss. 128, 140, below.

Debt barred by the law of limitation.—Where no appropriation is made by the debtor, the creditor may apply the payment to any lawful debt, though barred by the law of limitation. This frequently happens where there is a running account extending over several years. The creditor may in such a case appropriate the payments to the earliest items barred by limitation, and may sue for such of the balance as is not so barred (b).

(w) In *Luchmeswar Sing Bahadur v. Syad Lutf Ali Khan* (1871) 8 B. L. R. 110, at p. 112.

(x) *Maharaja of Benares v. Har Narain Singh* (1900) 28 All. 25.

(y) *Geeroo Doss Dutt v. Ooma Churn Roy* (1874) 22 W. R. 525.

(z) Per Richardson, J., in *Biswanath v. Someswar* (1917) 21 Cal. W. N. 1035, (Walmsley, J., *dubitante*).

(a) *Bardwell v. Lydall* (1831) 7 Bing. 439, 494; 33 R. R. 540, 545.

(b) *Bishun Perkash v. Siddique Roy* (1916) 1 Pat. L. J. 474.

61.—Where neither party makes any appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionably.

Application of payment where neither party appropriates. Ss. 61

Scope of the Section.—This section must be read continuously with s. 60. It must be carefully observed that it does not lay down a strict rule of law, but only a rule to be applied in the absence of anything to show the intention of the parties. Not only any express agreement, but the mode of dealing of the parties, must be looked to. On the other hand, the circumstances may show that accounts which it was at a party's option to treat as separate were, in fact, treated as continuous, and then payments will be appropriated to the earliest unpaid item of the combined account (c).

The English rule had been followed in India before the enactment of the Contract Act (d). The rule is subject to certain modifications in cases where trust funds capable of identification have been mixed with the trustee's private current account. But these belong to their own special subject (e).

"Where neither party makes any appropriation."—See notes on s. 60 above.

Contracts which need not be Performed.

62.—If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Effect of novation, rescission and alteration of contract.

Illustrations.

(a) A. owes money to B. under a contract. It is agreed between A., B., and C. that B. shall thenceforth accept C. as his debtor instead of A. The old debt of A. to B. is at an end, and a new debt from C. to B. has been contracted.

(c) *Hooper v. Kay* (1876) 1 Q. B. Div. 178 (current account with continuing partner after dissolution of firm). *sappah v. Gadigi Muddappa* (1871) 6 M. H. C. 197.

(d) *Mooneappah v. Vencatarayudoo* (1870) 6 M. H. C. 32; *Hirada Karibas.* (e) See *Re Hallett's Estate* (1890) 13 Ch. Div. 696; *Re Stenning* [1895] 2 Ch. 433.

S. 62.

(b) A. owes B. 10,000 rupees. A. enters into an arrangement with B., and gives B. a mortgage of his (A.'s) estate for 5,000 rupees in place of the debt of 10,000 rupees. This is a new contract, and extinguishes the old.

(c) A. owes B. 1,000 rupees under a contract. B. owes C. 1,000 rupees. B. orders A. to credit C. with 1,000 rupees in his books, but C. does not assent to the arrangement. B. still owes C. 1,000 rupees, and no new contract has been entered into.

Novation.—The meaning of “novation,” the term used in the marginal note to this section, and now the accepted catchword for its subject-matter, has been thus defined in the House of Lords: “that, there being a contract in existence, some new contract is substituted for it either between the same parties (for that might be) or between different parties, the consideration mutually being the discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if, in that case, they give notice of that arrangement to a creditor, and ask for his accession to it, there becomes (*sic*) a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and, on the other hand, that they promise to pay him for that consideration” (*f*).

For the case of a novation on a change in the constitution of a firm it is declared in England by s. 17, sub-s. 3, of the Partnership Act, 1890, that “a retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.” This adds nothing to the law as already settled (*g*).

It has to be considered in every case not only whether a new debtor has consented to assume liability, but whether the creditor has agreed to accept his liability in substitution of the original debtor's.

(f) Lord Selborne in *Scarf v. Jar.* 1 P. C. 27; *Bilborough v. Holmes* (1876) 5 *dine* (1882) 7 App. Ca. 345, 351. Ch. D. 255.

(g) See *Rolfe v. Flower* (1865) L. R.

In some circumstances the creditor may be entitled to sue the retiring or the incoming partner in a firm at his option; mere continuing to deal with the firm as reconstituted will not preclude him from suing his original debtor (*h*). Novation is not consistent with the original debtor remaining liable in any form (*i*); it requires as an essential element that the right against the original contractor shall be relinquished, and the liability of the new contracting party accepted in his place (*j*).

It is an elementary rule that trustees and others administering money of which they are not the beneficial owners are not entitled to make a novation (which is to accept one security or liability instead of another) except so far as they are authorised by the trusts under which they act (*k*). The executor of a deceased partner may agree with the surviving partners to convert the partnership into a limited company and to accept fully paid up shares in the company in lieu of the testator's share. Such an agreement is valid and binding on the estate of the testator (*l*).

Election to accept the sole liability of new or surviving partners in a firm does not need very strong proof, but merely ambiguous acts will not do. One of two bankers in partnership died. A customer, knowing of this, drew out part of a sum standing in his name on deposit account, and took, according to the usual course, a fresh deposit note for the amount left in, signed by a cashier on behalf of the firm. This was no proof of novation (*m*). Another customer, also with the knowledge of the former partner's death, transferred a sum of money from current to deposit account (after consulting the surviving partner about investing it) and took a receipt signed by the surviving partner on behalf of the firm. This was a new contract with the surviving partner alone (*n*). A. advanced Rs. 50,000 to a firm consisting of three partners. The sum of Rs. 50,000 was made

(*h*) *Scarf v. Jardine* (1882) 7 App. 5 Bom. L. R. 617; *Muhammad Shah v. Sarauti* (1883) All W. N. 254.

both, and his choice when made is final. (*k*) *Smith v. Patrick* [1901] A. C. 282.

(*i*) See *Commercial Bank of Tasmania v. Jones* [1893] A. C. 313; and (*l*) *Jamsetji v. Hirjibhai* (1913) 37 Bom. 158, 167-169.

cp. *Perry v. National Prov. Bank of England* [1910] 1 Ch. 464, especially (*m*) *Re Head* [1893] 3 Ch. 426.

per Buckley, L.J. (*n*) *Re Head* (No. 2) [1894] 2 Ch. 236 C. A.

(*j*) *Nadinulla v. Channappa* (1903)

S. 62. up partly of securities handed over by A. to the firm and partly of cash. The firm passed a note to A. promising to return the securities and repay the cash with interest at 6 per cent. per annum payable every six months. Thereafter one of the partners died, and A. accepted from the surviving partners a promissory note in the firm's name for Rs. 50,000 to be paid *in cash* with interest at the same rate, but not payable with six months rests. This was a new contract with the surviving partners alone (o).

The High Court of Calcutta has held that the present section does not apply where the agreement to substitute a new contract for the original one is made after the breach of the original contract. In that case (p) the plaintiff sued the defendant to recover a sum of Rs. 1,100 due on a bond. It was found that *after* the due date of the bond the plaintiff agreed to accept from the defendant in satisfaction of the bond Rs. 400 in cash and a fresh bond for Rs. 700 (not the mere promise to pay the Rs. 400 and to give a bond for Rs. 700). The defendant failed to pay the Rs. 400 and to pass the bond, and the plaintiff sued to recover the amount of the original bond. For the defendant it was contended that the subsequent agreement had made a novation. The Court, however, held that s. 62 did not apply, as the subsequent agreement was entered into after the breach of the original contract, and that the defendant, having failed to perform the satisfaction which he had promised to give, remained liable on the original contract. "If the parties to a contract have in fact made a new contract in substitution of the old, or have modified the old one, then the old contract is at an end, and the new contract or the modified contract takes its place; but the mere fact of one party alleging that a new contract has been substituted for the old one does not of itself put an end to the old contract, even as against the party who so alleges, unless the allegation is proved to be true. S. 62 of the Contract Act made no difference in the law in that respect" (q). The same view of the application of this section was taken by Seshagiri Iyer, J., in a recent Madras case (r). On the other hand,

(o) *Markandrai v. Virendrarai* (1917) 19 Bom. L. R. 837, 843-844. *Bibee v. Hurray Kristo Nath* (1892) 8 Cal. 926, 929.

(p) *Manohur v. Thakur Das* (1888) 15 Cal. 319. (r) *Ramiah v. Somasi* (1915) 29 Mad. L. J. 125.

(q) Per Garth, C.J., in *Roushan*

Kumaraswami Sastri, J., in the same case expressed the opinion that the section applies even though the new agreement is made after breach of the original agreement. The correct view, it is submitted, is the one which is taken by the High Court of Calcutta. S. 62.

Whether or not there is a novation of a contract is in each case a question of fact. Thus, in a suit (s) by the Government of Bengal against the defendant as surety for the treasurer of a collectorate on four surety bonds executed by the defendant, the Judicial Committee held that the mere fact that the collector examined the accounts at the end of each year and struck the balance which he certified to be correct, and that on each occasion the defendant executed a new bond without, however, the old bonds being cancelled or given up, did not constitute a novation of the old bonds so as to preclude the Government from suing the defendant on the old bonds on subsequent discovery of embezzlement of moneys by the treasurer during each year. The following is a peculiar case: A. owes B. Rs. 330. A. transfers the whole of this property by a registered instrument to C. The consideration for the transfer is Rs. 2,000 out of which C. agrees to pay Rs. 330 to B. Here there is no novation, for there is no contract between A., B. and C. that B. shall accept C. as his debtor instead of A. B. is therefore entitled to recover the debt from A., though he may also be entitled to recover the amount from C. under the registered document on the principle enunciated in the notes on s. 2 that where a contract between A. and C. is intended to secure a benefit to B., B. may sue to enforce it (t).

Alteration of Contract.—In English usage the term *novation* is confined to agreements which introduce a new party. It is not applied to the substitution of a new agreement, or the variation of particular terms in a subsisting agreement, between the same parties. Practically the most important questions arising in this last connection are questions of evidence, and for this purpose the rules forbidding the admission of oral evidence to contradict or vary written agreements (u) have to be borne in mind. It must of course be shown, especially

(s) *Lala Banshidhar v. The Government of Bengal* (1872) 9 B. L. R. 364.

(t) *Debnarayan Dutt v. Chunilal Ghose* (1914) 41 Cal. 137, 141, 144.

(u) Laid down for British India in

the Evidence Act, s. 92; as to the effect of subsequent variation on the right to specific performance, see Specific Relief Act, s. 26 (e).

- S. 62. where it is sought to prove a variation not by an express agreement, but by a course of conduct, that the variation was intended and understood by both parties (r). In the case of such an agreement to substitute a new contract, that which is substituted must be a contract capable of being enforced in law; so that if by reason of any want of formality, such as registration, the document containing the contract is inadmissible in evidence, the original contract will still be operative (w). In *Sirdar Kuar v. Chandrawati* (x) accounts were stated between a creditor and his debtor, and the latter passed the former a bond for the balance found due payable by instalments, in which he hypothecated certain immovable property as collateral security. The creditor received payment of three of the instalments under the bond, and then brought a suit against the debtor for the balance of the debt, basing his claim on the accounts stated. It was held that the suit would not lie, as by the execution of the bond the debt due on the accounts stated had come to an end. It appears from the report of this case that the bond was impounded by the revenue authorities, as it was insufficiently stamped, and this seems to be the reason for bringing the suit on the original debt instead of on the bond. It has been held (y) that this decision does not apply if the execution of the hypothecation bond is denied by the defendant, and the bond remains on that ground unregistered. In such a case the plaintiff could not sue on the unregistered bond (z), and he would therefore be entitled to recover upon the account stated. "We cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond, and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts" (y). Similarly where a mortgagee accepts a new security in lieu of the old, and the new security is held to be invalid by reason of a rule of Hindu law

(r) See *Darnley v. L. C. and D. R. Co.* (1897) Punj. Rec. no. 71; *Abdul Kayam v. Bahadur Vitkoba* (1911) 14 Bom. L. R. 26.
 (w) *Nundo Kishore Lall v. Musst. Ramsookhee Koor* (1879) 5 Cal. 215;
Raja Ram v. Meher Khan (1882) Pun. Rec. no. 66; *Udho Shah v. Hira Shah* (1882) 4 All. 330.
 (y) *Kiam-ud-din v. Rajoo* (1888) 11 All. 13.
 (z) See Indian Registration Act 16 of 1908, s. 49.

pleaded by the mortgagor, the mortgagor is entitled to fall back upon the old security. It would not be consistent with equity or good conscience that the mortgagor, having successfully maintained that the new security is invalid, should be allowed to claim the benefit of the transaction by which the new security was created as a release of the old security (a).

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Where a contract for the sale of goods provides for delivery being given within a specified period, and the contract contains an arbitration clause, a mere extension of the time for giving delivery does not make it a new contract so as to put an end to the arbitration clause (b).

Transfer of actionable claims.—As to assignment of debts and actionable claims, see the Transfer of Property Act IV of 1882, Chap. VIII.

Promissory note on account of pre-existing debts.—The cases referred to above must be distinguished from those where a person lends money or sells goods to another, and the debtor or buyer gives a promissory note for payment of the loan or price at a future time. In such cases the rule is that where a cause of action for money is once complete in itself, whether for goods sold or for money lent, or for any other claim, and the debtor then gives a note to the creditor for payment of the money at a future time, the creditor, if the note is not paid at maturity, may sue for the original consideration, and if from any cause the bill or note is not admissible in evidence, this will not affect the original cause of action. But where the original cause of action is on the note itself, and there is no cause of action independent of it, as, for instance, when, in consideration of A. depositing money with B., B. contracts by a promissory note to repay it with interest at six months' date, there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other. In such a case the note is the only contract between the parties, and if, for want of a proper stamp or some other reason, the note is not admissible in evidence, the creditor must lose his money (c).

(a) *Har Chandi Lal v. Sheoraj Singh* (1917) 44 I. A. 60, 39 All. 178.

(b) *Lachminarain v. Hoare, Miller & Co.* (1914) 41 Cal. 35.

(c) *Sheikh Akbar v. Sheikh Khan Singh* (1881) 7 Cal. 256; *Dargavarapu v. Rampratap* (1902) 25 Mad. 580; *Yarlagadda Veera Ragavayya v. Goranlla*

S. 62. **Excursus to S. 62: Unauthorised alteration of documents.**—What if the document recording an agreement is altered without the consent of both parties? No answer to this question is given by the Contract Act, or anywhere in the Anglo-Indian Codes, but Indian practice (notwithstanding a solitary reported opinion to the contrary) (*d*) follows the authorities of the Common Law. The rule is that any material alteration in an instrument made by a party, or by any one while it is in the party's custody or in that of his agent, disables him from relying on it either as plaintiff or as defendant (*e*). In its earliest form it was connected with the old manner of pleading and producing deeds, but in modern times it was deliberately extended on grounds of policy: "A party who has the custody of an instrument made for his benefit is bound to preserve it in its original state" (*f*). The principle is said to be "founded on great good sense, because it tends to prevent the party in whose favour [an instrument] is made from attempting to make any alteration in it"; and it is "as applicable to one kind of instrument as to another" (*g*). Any alteration is material which affects either the substance of a contract expressed in the document (*h*), or the identification of the document itself, at all events where identification may be important in the ordinary course of business (*i*). Alterations are immaterial if they

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- Ramayya* (1906) 29 Mad. 111; *Rahmatulla v. Ganesb Das* (1891) Punj. Rec. no. 82; *Baldeo v. Mul Chand* (1904) Punj. Rec. no. 7; *Pramatha Nath v. Dwarakanath* (1896) 23 Cal. 851; *Krishnaji v. Rajmal* (1899) 24 Bom. 360; *Subramanian v. Muthia* (1911) 35 Mad. 630, at p. 641.
- (*d*) *Ede v. Kanto Nath Shaw* (1877) 3 Cal. 220, where it seems to be supposed that s. 37 of the Contract Act has abolished all defences to actions on contracts not expressly mentioned in the Act.
- (*e*) Leake, 573; *Pattinson v. Luckley* (1875) L. R. 10 Ex. 330; *Suffell v. Bank of England* (1882) 9 Q. B. Div. 555, where authorities are collected; notes to *Master v. Miller* in 1 Sm. L. C.
- (*f*) *Davidson v. Cooper* (1844) 13 M. & W. 343, 352; 67 R. R. 638, Ex. Ch.
- (*g*) Grose, J., in *Master v. Miller* (1791) 4 T. R. 320, 345; 2 R. R. 399, 406; 1 Sm. L. C., at p. 795.
- (*h*) The alteration need not be obviously to the disadvantage of the party whose position is altered. See *Gardner v. Walsk* (1855) 5 E. & B. 83.
- (*i*) *Suffell v. Bank of England* (1882) 9 Q. B. Div. 555. A Bank of England note with the number altered is not substantially the same note. It does not follow that in other kinds of documents commonly marked with consecutive numbers the numbers are material; but the fact that a person takes the trouble of altering a number shows that in his opinion, at any rate, it is material for some purpose.

merely express what was already implied in the document, or add particulars consistent with the document as it stands, though superfluous (*j*), or are innocent attempts to correct clerical errors (*k*). There may be cases of wilful fraud practised by a stranger where the rule will not be held to operate against the person who had the custody of the document (*l*). It may be that some degree of negligence on his part would in such a case have to be shown before he could be deprived of his rights. S. 62.

Indian decisions.—The Indian decisions on the subject may be divided into two classes. The first class comprises cases in which the suits were for bond debts brought upon the basis of altered documents. The second class relates to suits on documents which by the very execution thereof effect a transfer of interest in specific immovable property. As to the former class of cases, the Indian Courts have followed the principles of English law set out above, the point for decision in each case being whether the alteration was or was not material. Thus where a bond was passed to the plaintiff by one of three brothers, and the plaintiff forged the signature of the other two to the bond, and brought a suit upon it in its altered form against all the three brothers, it was held that the alteration avoided the bond (*m*). In such a case the plaintiff is not entitled to a decree even against the real executant. Similarly, where the date of a bond was altered from 11th September to 25th September, it was held that the alteration was material, as it extended the time within which the plaintiff was entitled to sue; it did not matter that the period of limitation, though reckoned from 11th September, had not expired at the date of the suit (*n*). On the same principle an alteration in a document which has the effect of enabling the payee to sue on the document in a Court in which he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document (*o*). Likewise, where the plaintiff altered a bill of

(*j*) *Lowe v. Fox* (1887) 12 App. Ca. 206 where the document was a form of statement required by the Lunacy Act then in force. *dhur* (1881) 7 Cal. 616; *Gour Chandra Das v. Prasanna Kumar Chandra* (1906) 33 Cal. 812; *Karamali v. Norain Sing* (1900) *Punj. Rec.* no. 91.

(*k*) *Hougate and Osborn's Contract* [1902] 1 Ch. 451. (*n*) *Govindasami v. Kuppusami* (1889) 12 Mad. 239.

(*l*) Per Lord Herschell, 12 App. Ca., at p. 217. (*o*) *Lakshammal v. Narasimharaghava* (1915) 38 Mad. 746.

(*m*) *Gogun Chunder Ghose v. Dhuroni-*

32. exchange from D.P., that is, documents to be delivered against payment, into D.A., that is, documents to be delivered against acceptance, it was held that the drawer was not liable upon the altered bill (p). But the fact that the signature of an attesting witness had been affixed after execution to a bond that does not require to be attested is not a material alteration, and does not make the bond void (q). Nor is it a material alteration to add in a document a description of immovable property which is not within the scope of the document (r). And where a seller of goods inserted in the document of sale a clause excepting a claim on a former account, it was held in a suit by him for the price of the goods that the alteration was not material so as to defeat his claim for the price (s). Besides the alteration being material, it must have been made in a document which is the foundation of the plaintiff's claim. A material alteration, therefore, in a written acknowledgment of debt does not render it inoperative, as the acknowledgment is merely evidence of a pre-existing liability (t). In the last-mentioned cases, it is to be observed, the suit was not founded on the acknowledgment, but on the original loan, and the acknowledgment was relied on merely to save the plaintiff's claim from being barred, and the Court admitted it in evidence for that purpose. But where a creditor bases his suit, not on the original loan, but on a bond passed by the defendant, and it is found at the hearing that the bond has been materially altered so as not to entitle him to a decree on the

(p) *Mesha Akronel v. The National Bank of India, Ltd.* (1903) 5 Bom. L. R. 524.

(q) *Kashi Nath Roy v. Surbanand Shaha* (1885) 12 Cal. 317; *Venkatesh v. Baba* (1890) 15 Bom. 44; *Ramayyar v. Shanmugam* (1891) 15 Mad. 70, dissenting from *Sitaram v. Daji* (1883) 7 Bom. 418; *Ramier v. Shanmugam Pillai* (1892) 2 Mad. L. J. 39; *Mangal Sen v. Cannon* (1885) Punj. Rec. no. 118.

(r) *Abdool Hoosein v. Goolam Hoosein* (1906) 30 Bom. 304, 318.

(s) *Gorindsami Naidu v. Kuppusami Pillai* (1893) 3 Mad. L. J. 266.

(t) *Atmaran v. Umedram* (1901) 25 Bom. 616 (where the date of the ac-

knowledgegment was altered); *Harendra Lal Roy v. Uma Charan Ghosh* (1905) 9 C. W. N. 695 (where an entry as to interest was interpolated in the acknowledgment); *Lal Saha v. Monmohan Goswami* (1900) 5 C. W. N. 56, where the suit was founded on the original loan, and the plaintiff relied on a promissory note alleged to have been passed by the defendant as evidence of the loan. It was found that the note was not genuine, but the plaintiff was allowed to prove the debt by other evidence, on the ground that, though the note was forged, the suit was not founded on the note. This is a case of entire fabrication, as distinguished from alteration of a document.

bond, the plaintiff will not be allowed to fall back upon the original consideration, and to rely on the altered bond as proof of acknowledgment (*u*). And it has been held by the Madras High Court (*v*) that a purchaser for value of a piece of land from a person empowered to sell under a will is not precluded from relying upon the will to prove the validity of the sale, though forged attestations are added to the will after the sale. The decision is obviously right, for the purchaser never had the custody of the will, nor is a will a document to which any one, properly speaking, is party or privy; and his title was complete before the forged attestations were made. An alteration made in good faith to carry out the original intention of the parties is not material. Thus where the interest provided for in a mortgage bond was in terms "one rupee per mensem", and the mortgagee inserted the words "per cent." after the words "one rupee", and the case was one that anybody reading the document could not fail to read it in the sense that interest was to be paid at the rate of one rupee per cent. per mensem, it was held in a suit on the bond that the mortgagee was entitled to interest at that rate (*w*).

We shall next consider the cases where the effect of the execution of the altered document is to create an interest in the property comprised in the document. Of the five Indian decisions on this head two relate to hypothecation bonds, and three to mortgages (*x*) of immovable property. The rule to be derived from these cases may be stated as follows: A material alteration, though fraudulent, made in a mortgage or hypothecation bond does not render it void for all purposes, and the altered document may be received in evidence on behalf of the person to whom it is executed for the purpose of proving the right title or interest created by, or resulting from, the execution of the document, *provided that the suit is based on such right, and not on the altered document*. This rule is professedly founded by Indian Courts on English decisions (*y*). The reason is stated to be that the

(*u*) *Gour Chandra Das v. Prasanna Kumar Chandra* (1906) 33 Cal. 812 (where names of parties were added). "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan," etc.: Transfer of Property Act, 1882, s. 58.

(*v*) *Paramma v. Ramachandra* (1883) 7 Mad. 302.

(*w*) *Ananda Mohan v. Ananda Chandra* (1917) 44 Cal. 154.

(*z*) "A mortgage" in this country is

(*y*) *Davidson v. Cooper* (1844) 13 M. & W. 343, 67 R. R. 638; *Doe* d.

- B. 62. right title or interest created by, or resulting from, the very fact of the execution of the document does not rest on a contract or a covenant, but arises by operation of law, and a subsequent alteration, therefore, does not divest the vested right and re-vest the property in the mortgagor (z).

In the earliest of these cases, known as *Ramasamy Kon's Case* (a), the plaintiff, who held a hypothecation bond from the defendants, altered the date of the bond so as to bring the personal remedy, which, according to the true date was barred, within the period of limitation. The suit was to recover the balance of the bond debt from the defendants personally, and by sale of the hypothecated property. The Court passed a decree for the amount due against the *property*, holding that the altered document might be used as proof of the right created by or resulting from its having been executed. The exact frame of the plaint in this case is not stated in the report, and, according to later cases, the decision could only be upheld if the suit was not based on the altered document (b). In *Ganga Ram v. Chandan Singh* (c), a case similar to the above, a hypothecation bond was fraudulently altered by the plaintiff so as to comprise a larger area of land than was actually hypothecated. The suit was brought on the altered bond, and it was held in appeal by the High Court of Allahabad that the suit was rightly dismissed by the lower Court (d). In a sub-

Beanland v. Hirst (1821) 23 R. R. 756; *Hutchins v. Scott* (1837) 2 M. & W. 809, 46 R. R. 770; *West v. Steward* (1845) 14 M. & W. 47; *Agricultural Cattle Insurance Co. v. Fitzgerald* (1851) 16 Q. B. 432. See these cases collected in *Mangul Sen v. Shankar* (1903) 25 All. 580.

(c) *Christacharlu v. Karibasayya* (1885) 9 Mad. 399, 412; *Subrahmanya v. Krishna* (1899) 23 Mad. 137, 143; *Mangal Sen v. Shankar* (1903) 25 All. 580, 596, 604. In the last of these cases, Aikman, J., said in a dissenting judgment that the view that the rule as to material alteration has no application to the case of mortgages would be a premium on dishonesty, and would enable a mortgagee to try the experiment of claiming a fraudulently enhanced amount of mortgage money

without the risk of losing when the fraud is discovered: pp. 611, 612.

(a) (1866) 3 M. H. C. 247. The judgment in this case was pronounced in two appeals relating to the same point. *Ramasamy Kon* and others who were plaintiffs in the original suit were appellants in both appeals.

(b) See *Christacharlu v. Karibasayya* (1885) 9 Mad. 399, 410, 420.

(c) (1881) 4 All. 62.

(d) Though the soundness of this decision has not been questioned, there is a passage in the judgment, "The bond now produced by the plaintiff should be discarded as evidence of the hypothecation of land," which is against the principles set out in the text, and is held in subsequent cases to be against

sequent Madras case (e) the plaintiff sued to recover the principal and interest due on a mortgage bond fraudulently altered by him by doubling the rate of interest and inserting a condition making the whole sum payable upon default of payment of any one instalment. The suit was brought on the altered bond, and the full Bench confirmed the decision of the Courts below, dismissing the plaintiff's entire claim. In *Subrahmania v. Krishna* (f), on the other hand, where also a mortgage bond was altered in a material respect, the suit was not based on the altered bond (g), and the Court allowed the bond to be used as proof of the mortgagee's right to sell the property. In the last of the series of cases, decided by a full Bench of the Allabad High Court (h), a puisne mortgagee brought a suit for sale against his mortgagors, and impleaded therein as a defendant a prior mortgagee, offering to redeem the prior mortgage. The prior mortgage, when tendered in evidence by the prior mortgagee, was found to have been tampered with, and altered in a material particular, the extent of the share mortgaged having been increased. Upon these facts it was held that such alteration did not render the instrument void *in toto*, so as to justify the Court in ignoring its existence and passing a decree in favour of the plaintiff for sale of the property comprised in it without payment of the amount due under it to the prior mortgagee. It will be seen that in this case there was no suit brought upon the altered document, nor was the prior mortgagee a plaintiff; but the decision of the majority of the full Bench did not rest upon these narrow grounds (i).

In both these classes of cases it has been held that where a suit is brought by a plaintiff on a document fraudulently altered by him he

the weight of authority. See *Christachari v. Karibasayya* (1885) 9 Mad. 399, 412; and *Mangal Sen v. Shankar* (1903) 25 All. 580, 604.

(e) *Christachari v. Karibasayya* (1885) 9 Mad. 399.

(f) (1899) 23 Mad. 137.

(g) 23 Mad. p. 143. O'Farrell, J., held in a dissenting judgment that the suit was based upon the altered document: p. 149.

(h) *Mangal Sen v. Shankar* (1903) 25 All. 580.

(i) It has not been overlooked that Stanley, C.J. in two places distinguishes this case from *Gangaram v. Chondan Singh* (1881) 4 All. 62, *supra* stating, "It is one thing for the Court to refuse its aid to a fraudulent plaintiff, and another thing to direct the sale of property in which a defendant (prior mortgagee) has an interest without compensating him for such interest, because on production of his title-deed it is found to have been tampered with." See 25 All., pp. 58, 601.

- S. 62. will not be allowed subsequently to amend the plaint so as to base his claim on the document as executed by the defendant (*j*). The Courts do not appear to have decided in these cases that the defendant is not liable in some form of proceeding to repay money which he has actually received (*k*).

In the case of negotiable instruments the English rule has been adopted to its full extent, as will be seen from ss. 87—89 of the Negotiable Instruments Act XXVI of 1881:—

S. 87: “Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration, and does not consent thereto, unless it was made in order to carry out the common intention of the original parties; and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof. The provisions of this section are subject to those of ss. 20, 49, 85, 125.”

S. 88: “An acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement, notwithstanding any previous alteration of the instrument.”

S. 89: “Where a promissory note, bill of exchange, or cheque, has been materially altered, but does not appear to have been so altered, or where a cheque is presented for payment which does not, at the time of presentation, appear to be crossed, or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay, and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker from all liability thereon; and such payment shall not be questioned by reason of the instrument having been altered, or the cheque crossed” (*l*).

(*j*) *Gogun Chunder Ghose v. Dhurandhar* (1881) 7 Cal. 616; *Ganga Ram v. Chandan Singh* (1881) 4 All. 62; *Christachari v. Karibasayya* (1885) 9 Mad. 399.

(*k*) See observations of Stanley, C.J., in *Mangal Sen v. Shankar* (1903) 25 All. 580, at p. 599.

(*l*) The English Bills of Exchange

Act, 1882, s. 4, contains similar provisions. The holder in due course of a bill materially altered, the alteration not being apparent, can enforce payment of the bill according to its original tenor, whereas the Indian Act only protects persons paying him according to the apparent tenor.

The framers of the Negotiable Instruments Act must have assumed that the English rule was applicable in India to other kinds of instruments; for it would be an absurd state of the law if such a rule applied to negotiable instruments alone.

63.—Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Promisee may dispense with or remit performance of promise.

Illustrations.

(a) A. promises to paint a picture for B. B. afterwards forbids him to do so. A. is no longer bound to perform the promise.

(h) A. owes B. 5,000 rupees. A. pays to B. and B. accepts, in satisfaction of the whole debt, 2,000 rupees paid at the time and place at which the 5,000 rupees were payable. The whole debt is discharged.

(c) A. owes B. 5,000 rupees. C. pays to B. 1,000 rupees, and B. accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim (m).

(d) A. owes B., under a contract, a sum of money, the amount of which has not been ascertained. A., without ascertaining the amount, gives to B. and B., in satisfaction thereof, accepts the sum of 2,000 rupees. This is a discharge of the whole debt, whatever may be its amount.

(e) A. owes B. 2,000 rupees, and is also indebted to other creditors. A. makes an arrangement with his creditors, including B., to pay them a composition (n) of eight annas in the rupee upon their respective demands. Payment to B. of 1,000 rupees is a discharge of B.'s demand.

Rule of the Common Law.—This section makes a wide departure from the Common Law. In England, to quote an authoritative exposition, “it is competent for both parties to an executory contract by mutual agreement, without any satisfaction, to discharge the obligation of that contract”; in other words, as reciprocal promises are a sufficient consideration for each other, so are reciprocal discharges. “But an executed contract cannot be discharged except by release under seal, or by performance of the obligation, as by payment

(m) See s. 41, p. 289 above.

sation” by the repealing and amending

(n) The word “composition” has been substituted for the word “compen-
Act (XII of 1891).

S. 63. where the obligation is to be performed by payment"; but, by the law merchant, the obligation of a negotiable instrument may be discharged by mere waiver (o). Subject to that exception, "the new agreement in rescission or alteration of a prior contract must in general satisfy all the requirements of an independent contract" (p), and so must an agreement to accept satisfaction for a right of action which has arisen by breach of a contract (q). And in particular, although the rule that the Court does not inquire into the adequacy of the consideration is applicable, and therefore anything different in kind from what is due may be a good satisfaction without regard to its apparent value, yet the Court cannot help knowing that nineteen pounds are not worth twenty pounds, and accordingly, a less sum of money cannot be good satisfaction for a greater sum already due. This last rule was confirmed in our time with great reluctance by the House of Lords (r). But the English rules are not material in British India, save so far as the knowledge of them may be useful to prevent misunderstanding and misapplication of English decisions founded on or involving them. The intention of the present section to alter the rule of the Common Law is clear, and has been recognised in several Indian cases (s).

Scope of the section.—The present section and s. 62 must be construed so as not to overlap each other. This would be done by holding that agreements referred to in s. 62 are agreements which more or less affect the rights of both parties under the contract discharged by such agreements; whilst those referred to in s. 63 are such

(o) *Foster v. Dawber* (1851) 6 Ex. 839; *Finch*, S. C. 678. See per Parke, B., at pp. 684, 685; Bills of Exchange Act, 1882, s. 62.

(p) *Leake*, 579. See *King v. Gillett* (1840) 7 M. & W. 55; 56 R. R. 616. The common form of pleading was that the plaintiff had discharged the defendant, but the plea could be supported only by proving an agreement.

(q) *Leake*, 641—643.

(r) *Foakes v. Beer* (1884) 9 App. Ca. 605; *Finch*, S. C. 319; notes to *Cumber v. Wane* in 1 Sm. L. C. A. negotiable instrument for the same or

even a less sum will do; not, of course because it is the equivalent of money, but, on the contrary, because it is not money. This is subject to the instrument being in fact given and accepted in full discharge and not merely as conditional payment of the amount due: per *Fletcher Moulton*, L.J.; *Hirachand v. Temple* [1911] 2 K. B. 330, 340.

(s) *Manohur Koyal v. Thakur Das Naskar* (1888) 15 Cal. 319, 326; *Davis v. Cundamani Mudali* (1906) 19 Mad. 398, 402; *Naoroji v. Kazi Sidick* (1906) 20 Bom. 636, 644.

as affect the right of only one of the parties. The former case necessarily implies consideration, which may be either the mutual renunciation of right, or, in addition to this, the mutual undertaking of fresh obligations, or the renunciation of some right on the one side and the undertaking of some obligation on the other. It is only when the agreement to discharge affects the right of only one party that consideration might be found wanting, and there alone the Indian law departs from the English law by making provision for every such possible case in s. 63 (t). S. 63.

Remission of performance.—The High Court of Bombay has recently laid down that a dispensation or remission under this section requires a promise (s. 2 (b)), or, what is the same thing, an agreement (s. 2 (e)) (u). “It is only by a promise that there can be a dispensation or remission within the meaning of s. 63; there must be a proposal of the dispensation or remission which is accepted.” It has accordingly been held by that Court that where an agreement on behalf of a district municipality was required by law (v) to be in writing and under the seal of the municipality, a remission made by the district municipality of Trimbak which did not comply with those requirements was not binding on the body. At the same time the Court held that an agreement for dispensation or remission does not require any consideration, on the ground that consideration is not an essential part of an agreement “because we have a provision (in s. 25) that ‘an agreement made without consideration is void’ *except* in the cases there indicated.” We are unable, with great respect, to accede to the view taken by the High Court of the present section.

There is nothing in the words of the section about promise, proposal, or acceptance, and we fail to see why any such matter should be imported, except on the assumption that the intention was to alter the English law of accord and satisfaction only by abrogating the requirement of consideration. But if consideration is no longer required, why should agreement be required? The language of the Act is against it; the illustrations appear rather to avoid the use of the word “agreement”: see especially illustration (c), where the

(t) *Per Cur.* in *Davis v. Cundasami Municipality* (1903) 28 Bom. 66.
Mudali (1896) 19 Mad. 308. (v) See *District Municipal Act II* of
 (u) *Abaji Silaru v. Trimbak Municipality* 1884 (Bombay), 1. 30.

- S. 63. arrangement is in truth a perfectly good contract at common law. Put the case, a conceivable though not probable one, of B. remitting the performance of A.'s contract, having himself nothing more to perform, and A. refusing to be discharged. Can A. insist as a matter of right on completing performance? Can he compel B., for example, to take his money or to accept delivery of marketable goods which B. has paid for, but does not want? We should say, in law and in common sense, No. The Bombay High Court would apparently say Yes. We do not deny that there may be cases in which it would be to A.'s prejudice not to complete his performance. An artist may be entitled to insist on carrying through a commission for the sake of his reputation, or an engineer to have a bulky piece of machinery for which there is no market elsewhere cleared away from his workshop. But we should regard such cases as exceptional. The judgment under consideration seems to make them examples of an invariable rule.

Had the agreement sued upon by the municipality been under seal (which it was not), the decision itself would perhaps be right, not because the remission of a promise is necessarily itself a promise or agreement, but on the principle of general jurisprudence that an obligation which needed formality to create it needs, in the absence of a special rule, no less to dissolve it. This seems especially applicable to corporations, which can only contract through their appointed officers, and largely through prescribed forms.

Where a promisee remits a part of the debt, and gives a discharge for the whole debt on receiving the reduced amount, such discharge is valid, even though the remission was in pursuance of an oral agreement, which is inadmissible under s. 92 (4) of the Evidence Act, 1872. Thus where a lessor, to whom rent is due under a registered lease, accepts a smaller amount of rent from the lessee in pursuance of a subsequent oral agreement to reduce the rent, and passes a receipt in full discharge of the rent due, the discharge will take effect independently of the prior oral agreement, which certainly is not illegal, though it cannot be proved under the Evidence Act (w).

A dispensation or remission under this section may well be contingent on the happening of a future event, just as an original promise

(w) *Karampalli v. Thekku Vittel* (1902) 26 Mad. 195.

may. The holder of a promissory note from the officers of a masonic lodge agreed in writing to make no claim "if the . . . lodge building which has been burnt down is resuscitated." He cannot sue on his note after the lodge is rebuilt (x). It would be monstrous if he could.

Discharge from liability on negotiable instruments is specially dealt with in the Negotiable Instruments Act, 1881, ss. 82, 90.

Agreement to extend time.—An agreement simply extending the time for performance of a contract is exempted by this section from any requirement of consideration to support it. No consideration is necessary to support such an agreement, exactly as none is required for the total or partial remission of performance (y). See, however, the commentary under the head "Remission of performance" (z). But an agreement by a mortgagee, about to exercise his power of sale, to postpone the sale for four days is not within this section; for it is not an extension of the time for performing the mortgagor's promise to pay the debt, which time is already past. Redemption, when the mortgagor is entitled to redeem, is not a performance of the original contract to pay the debt; and the exercise of the power of sale is not an exercise of a right of action on that contract (a). The time for performance of the contract must not be confounded with the time within which, notwithstanding default in performance, the mortgagor in default might still be allowed to redeem (b). These two decisions of the Bombay and Madras High Courts are quite consistent.

It need hardly be added that this section does not entitle a promisee to extend the time for performance of his own accord for his own purposes. Thus where a date is fixed for delivery of goods under a contract, and the seller fails to deliver the goods, the buyer may not of his own accord give further time to the seller for giving delivery, so as to claim damages on the footing of the rate on the later date fixed by him; he is entitled to damages on the basis only of the rate prevailing on the date fixed for performance in the contract (c).

(x) *Abraham v. The Lodge "Good Will"* (1910) 34 Mad. 156, where other

no less futile points were also disposed of by the Court. The argument is not reported. Some unexplained formal irregularities are not relevant here.

(y) *Davis v. Cundasami Mudali* (1896)

19 Mad. 398, 402.

(z) P. 357 above.

(a) *Trimbak v. Bhagwandas* (1898) 23 Bom. 348.

(b) *Ib.*, p. 356.

(c) *Muthaya v. Lekku* (1914) 37

Mad. 412, 413, 417.

84. 64.—When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he have received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

Consequences
of rescission of
voidable contract.

Scope of the section.—Contracts declared voidable (s. 2, sub-s. 1). under this Act may be divided into two groups, namely contracts voidable in their inception under ss. 19 and 19A on the ground of fraud or the like, and contracts becoming voidable by subsequent default of one party, as mentioned in ss. 39, 53, and 55.

The use of the word “voidable” is immaterial. Whenever one party to a contract has the option of annulling it, the contract is voidable; and when he makes use of that option the agreement becomes void. It has been suggested that the present section applies only to the first-named class of contracts, which are voidable for want of free consent (*d*); but there is no apparent good reason for not including the others.

As to the applicability of this section to contracts rescinded under s. 39, see the commentary on s. 65 under the head “Becomes void.”

The direct application of this section, according to recognised canons of interpretation, is only to contracts declared voidable by the Act; but the principle which it affirms is one of general jurisprudence and equity, and applicable in various other cases. In *Sinaya Pillai v. Munisami Ayyan* (*e*) a mortgage was executed by the guardian of a minor appointed under the Guardian and Wards Act without obtaining the sanction of the Court, as required by s. 29 of the Act. Such a mortgage is voidable under s. 30 of that Act. Here the High Court said that the mortgage could not be avoided on behalf of the minor, except on restoring to the mortgagee the benefit received by the

(*d*) *Brahmo Dutt v. Dharmo Das* (1898) 22 Mad. 289; *Tejpal v. Ghose* (1898) 26 Cal. 381, per Maclean, *Ganga* (1902) 25 All. 59. See also C.J., expressly without giving a final opinion; *Natesa Aiyar v. Appavu* (1915) 38 Mad. 178, at p. 158, per White, C.J. (*e*) *Kuvarji v. Moti Haridas* (1878) 3 Bom. 234.

minor's estate under the mortgage, and based its decision on the principle which, as the Court said, "is acknowledged in s. 64 of the Indian Contract Act, in s. 35 of the Transfer of the Property Act, and generally by the Indian Courts as Courts of equity and good conscience." The same rule appears in ss. 38 and 41 of the Specific Relief Act.

Minor's contract.—It was settled that this section did not apply to a minor's contract, assuming that such contracts were only voidable. The term "person" in this section, it was said, does not comprise a minor, but means such a person as is referred to in s. 11, namely, a person who (among other conditions) is of the age of majority according to the law to which he is subject. But, since the decision of the Judicial Committee that a minor is wholly incapable of contracting (*f*) there is no arguable question, and further authority is needless (*g*). It does not follow, however, that a minor is entitled both to repudiate his agreement and to retain specific property which he has acquired under it, or to recover money after receiving for it value which cannot be restored. General principles of equity seem incompatible with such a result, and it would certainly be contrary to English authority (*h*). See notes to s. 11 under the head "minor's contract" and the cases there cited.

Election to rescind.—The broad principle on which this and the following section rest, and which, as we have seen, is not confined to cases expressly included in either of them, was thus stated in England in one of the weightiest judgments of recent times:—

"No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it" (*i*).

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- (*f*) *Mohori Bibee v. Dharmodas Ghose* (1903) 30 Cal. 539; L. R. 30 Ind. Ap. 114; *Kamta Prasad v. Sheo Gopal Lal* (1904) 28 All. 342.
- (*g*) See *Kampai Lal v. Baba Ram* (1910) 8 All. L. J. 1058; *Kamola Ram v. Kaura Khan* (1912) *Punj. Rec.* no. 41 (loan to a lunatic).
- (*h*) See *Valentini v. Canali* (1889) 24 Q. B. Div. 168; and *cp. Nottingham Building Society v. Thurstan* [1903] A. C. 6, 8, 10, and judgments of Romer, L.J., and Cozens-Hardy, L.J., in C. A. (1902) 1 Ch. at pp. 10, 13. See *Dattaram v. Vinayak* (1903) 28 Bom. 181; *Chinnaswami v. Krishnaswami* (1918) 35 Mad. L. J. 652.
- (*i*) *Clough v. L. & N.-W. R.* (1871) L. R. 7 Ex. 26; 37 in Ex. Ch. The judgment was Lord Blackburn's, though not delivered by him. See 7 App. Ca. at p. 360.

64.

For the same reason, a man cannot rescind a contract in part only. When he decides to repudiate it, he must repudiate it altogether. If he has put it out of his power to restore the former state of things, either by acts of ownership or the like, or by adopting and accepting dealings with the subject-matter of the contract which alter its character, as the conversion of shares in a company, or if he has allowed third persons to acquire rights under the contract for value (*j*), it is too late to rescind, and the remedy, if any, must be of some other kind. "You cannot both eat your cake and return your cake" (*k*).

It is hardly needful to say that rescission must be express and unequivocal. The clearest form of it is bringing a suit to set aside the contract. The will to rescind may also be declared by way of defence to an action brought on the contract; a declaration to that effect before action brought is not necessary as matter of law (*l*), though, generally speaking, the prudent course is to repudiate as soon as possible. See s. 66, p. 372, below.

By the Common Law lapse of time is not of itself a bar to setting aside a contract (subject to the risk of indefeasible rights having been acquired by third persons), but may be material as evidence of acquiescence, that is, of a tacit election to affirm the contract. But in British India, by the Limitation Act (*m*), a suit for the rescission of a contract must be dismissed, even though the defence of limitation is not set up, unless brought within three years from the time when the facts entitling the plaintiff to have the contract rescinded first became known to him. English authorities on what amounts to acquiescence would seem, therefore, to have very little practical application.

Benefit received "thereunder."—The benefit to be restored under this section must be benefit received *under* the contract. A. agrees to sell land to B. for Rs. 40,000. B. pays to A. Rs. 4,000 as a deposit at the time of the contract, the amount to be forfeited to A. if B. does not complete the sale within a specified period. B. fails to complete the sale within the specified period, nor is he ready and

(*j*) *Clarke v. Dickson* (1858) E. B. & E. 148; 113 R. R. 583, decided on a state of company law long since obsolete, and not very clear on the facts and dates, but the rule in question is correctly laid down.

(*k*) *Crompton, J., E. B. & E.* at p. 152.

(*l*) See note (*i*), p. 361.

(*m*) IX of 1908, s. 3, and Sched. I., art. 114.

willing to complete the sale within a reasonable time after the expiry of that period. *A.* is entitled to rescind the contract and to retain the deposit. The deposit is not a benefit received *under* the contract; it is a security that the purchaser would fulfil his contract, and is *ancillary* to the contract for the sale of the land (*n*). Where a guardian sells his ward's property for purposes not binding on the ward and the sale price is utilized for the purchase of lands for the ward not contemplated at the time of the sale, the land so purchased for the ward do not constitute "benefit" received by the ward under the contract so as to entitle the vendee to have it conveyed to him on repudiation by the ward of the sale by the guardian (*o*).

65.— When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations.

(a) *A.* pays *B.* 1,000 rupees in consideration of *B.*'s promising to marry *C.*, *A.*'s daughter. *C.* is dead at the time of the promise. The agreement is void, but *B.* must repay *A.* the 1,000 rupees.

(h) *A.* contracts with *B.* to deliver to him 250 maunds of rice before the first of May. *A.* delivers 130 maunds only before that day and none after. *B.* retains the 130 maunds after the first of May. He is bound to pay *A.* for them.

(c) *A.*, a singer, contracts with *B.*, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and *B.* engages to pay her a hundred rupees for each night's performance. On the sixth night *A.* wilfully absents herself from the theatre, and *B.*, in consequence, rescinds the contract. *B.* must pay *A.* for the five nights on which she had sung.

(d) *A.* contracts to sing for *B.* at a concert for 1,000 rupees, which are paid in advance. *A.* is too ill to sing. *A.* is not bound to make compensation to *B.* for the loss of the profits which *B.* would have made if *A.* had been able to sing, but must refund to *B.* the 1,000 rupees paid in advance.

Duties of restitution.—The matter corresponding to this and the last foregoing section, besides s. 39, is scattered about English books in the

(*n*) *Natesa Aiyar v. Appavu* (1915)
38 Mad. 178.

(*o*) *Chinnaswami v. Krishnaswami*
(1918) 35 Mad. L. J. 652.

65. shape of technical rules and exceptions unintelligible, as usually stated, to any one who is not acquainted, not only with modern English law, but with the formulas of the ancient common law system of pleading which has been obsolete in England for half a century, and survives only in a certain number of American jurisdictions. However, the substance of the question involved may be put thus:—"In what cases may an action be brought by a person who has entered into a special contract against the person with whom he has contracted, while his own side of the contract remains unperformed?" (p). And, as in English law the plaintiff, if he recover at all, must do so either on the original contract or on some other implied contract, it has to be considered whether the special contract is subsisting, but the defendant has dispensed the plaintiff from performing his part by making it impossible or otherwise, and, if it is not subsisting, whether a new contract by the defendant to pay for work done or other benefit which he has accepted, as the case may be, can be inferred. In the case where a party has contracted to do an entire work for a specific sum, he "can recover nothing unless the work be done, or it can be shown that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusions that the parties have entered into a fresh contract" (q).

The illustrations to this section are rather miscellaneous. In (a) we have a simple case of money paid under a mistake (*cp. s. 72*). In (b) it does not seem that the contract has become void at all, but, on the contrary, that B. has elected to affirm it in part, and dispense with the residue, there is no new contract under which he is bound to pay for the 130 maunds of rice, as is shown by this, that what he does accept he is undoubtedly bound to pay for at the contract price. In (c) it is not clear whether the contract is to be treated as divisible, so that A. is entitled to Rs. 100 for each night on which she did sing, or the Court is to estimate what, on the whole, the partial performance was worth; nor would it be clear in England without fuller statement of the terms and circumstances. Illustration (d) is again simpler; English lawyers would refer it to the head of money paid on a consideration which fails.

(p) 2 Sm. L. C. 10, 11th ed.

2 C. P. 651, 661, judgment of the Ex.

(q) *Appleby v. Myers* (1867) L. R.

Ch. per Blackburn, J.

Scope of the section.—This section applies only to cases where an agreement is discovered to be void, or when a contract becomes void [see s. 2, cl. (j)]. It does not, therefore, apply to cases where there is a stipulation that, by reason of a breach of warranty by one of the parties to the contract, the other party shall be discharged from the performance of his part of the contract. An insurance company is not, therefore, bound under the provisions of this section to refund to the heirs of the assured the premiums paid on the policy of life assurance where the assured had committed a breach of the warranty by making an untrue statement as to his age (r).

Where an agreement is discovered to be void.—The expression “discovered to be void” presents some difficulty as regards agreements which are void for unlawful consideration [ss. 23 and 24]. On the one hand it has been said that the words “agreement discovered to be void” apply to all agreements which are void *ab initio*, including agreements based upon an unlawful consideration (s). If this view be correct, it follows that the person who has paid money or transferred property to another for an illegal purpose can recover it back from the transferee under this section, even if the illegal purpose is carried into execution and both the transferor and transferee are *in pari delicto*. It is difficult to suppose that such a result was contemplated by the Legislature. Moreover, it would not be correct to say that, where a person gives money for an unlawful purpose, the agreement under which the payment is made can be, on his part, *discovered to be void*. On the other hand, it has been said that the present section does not apply where the object of the agreement was illegal *to the knowledge of both the parties* at the time it was made (t). If this view be correct, a person who has paid money or transferred property to another for an unlawful purpose cannot recover it back even if the illegal purpose is not carried into execution and the transferor is not as guilty as the transferee. This is clearly against the provisions of s. 84 of the Indian Trusts Act,

(r) *Oriental Government Security Life Assurance Co., Ltd. v. Narasimha Chari* (1901) 25 Mad. 183, 214.

(s) *Jijibhai v. Nagji* (1909) 11 Bom. 693, at pp. 697, 698; *Gulabchand v. Fulbai* (1909) 33 Bom. 411, at pp. 416, 417.

(t) *Nathu Khan v. Sewak Koori* (1911) 15 C. W. N. 408, at p. 409. See also *Dayabhai Tribhovandas v. Lakshmi-chand Panachand* (1885) 9 Bom. 358, at p. 362 (case of a wagering contract under s. 30 of the Act).

1882 (u). It seems on the whole that the present section does not apply to agreements which are void under s. 24 by reason of an unlawful consideration or object (v), and there being no other section in the Act under which money paid for an unlawful purpose may be recovered back, the analogy of English law will be the best guide. In fact, the English rule has actually been followed in a large number of cases in British India, and is reproduced as regards the transfer of property in s. 84 of the Trusts Act. According to that rule money paid in consideration of an executory contract or purpose which is illegal may be recovered back upon repudiation of the transaction, as upon a failure of consideration. But if the illegal purpose or any material part of it has been performed, the money paid cannot be recovered back, for the parties are then equally in fault, and *in pari delicto melior est conditio possidentis* (w). It has thus been held that though an agreement for payment of money to the parent or guardian of a minor in consideration of his giving his son or daughter in marriage is void under ss. 23 and 24 as being against public policy, yet *if the marriage is not performed*, as where the son or daughter to be given in marriage died before the marriage could take place, or the parent or guardian refuses to give the boy or girl in marriage, a party who has paid money under the agreement is entitled to recover it back (x). But if the marriage is performed, money paid under the agreement cannot be recovered back. The same principle applies to cases where a person transfers his property *benami* to another in order to defraud his

(u) That section runs as follows: "Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution or the transferor is not as guilty as the transferee, or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law, the transferee must hold the property for the benefit of the transferor."

(v) See *Gulabchand v. Fulbai* (1909) 33 Bom. 411, at p. 417; *Amir Khan v. Saif Ali* (1893) Punj. Rec. no. 86; *Sibkisor v. Manik Chandra* (1915) 21 Cal. L. J. 618, 620; *Srinivasa Ayyar v. Sesa Ayyar* (1918) 41 Mad. 197, 199,

204; *Ledu v. Hiralal* (1916) 43 Cal. 115. See also *Dayabhai Tribhovandas v. Lakshmichand Panachand* (1885) 9 Bom. 358, 362, and *Srikakolapu v. Gudirada* (1918) 34 Mad. L. J. 561, both cases of agreements by way of wager under s. 30.

(w) *Taylor v. Bowers* (1876) 1 Q. B. D. 291; *Herman v. Jeuchner* (1885) 15 Q. B. D. 561; *Kearley v. Thompson* (1890), 24 Q. B. D. 742; *Petherpermal v. Muniandi Servai* (1908) 35 I. A. 98, at p. 103.

(x) *Gulabchand v. Fulbai* (1909) 33 Bom. 411; *Ram Chand Sen v. Audaito Sen* (1884) 10 Cal. 1054; *Srinivasa Ayyar v. Sesa Ayyar* (1918) 41 Mad. 197.

creditor. In such cases, where the fraudulent purpose is not carried into execution, the transferee will be deemed to hold the property for the benefit of the transferor, as provided by s. 84 of the Trusts Act. Where, however, the fraudulent object is accomplished, the transferee will not be disturbed in his possession (y). The same rule applies where the unlawful object has been accomplished substantially, though not in its entirety (z). But it assumes that the act is *par delictum*, and it will not, therefore, apply where the transferor is not as guilty and is not to blame as much as the transferee (a). The same principles have been held to apply to payments made under agreements which are void under s. 28 as being in restraint of trade (b) and those made under agreements which are void under s. 30 as being by way of wager (c). See notes on s. 23 under the heads "Legislative Enactments", "Immoral", "Stifling Prosecution," "Marriage brokerage contracts", and "Sale of public offices".

A transferee of property which from its very nature is inalienable is entitled to recover back his purchase money from the transferor, if the transfer is declared illegal and void (d).

(y) *Petherpermal v. Muniandi Servai* (1908) 35 I. A. 98; *Chenvirappa v. Puttappa* (1887) 11 Bom. 708; *Honappa v. Narasaya* (1898) 23 Bom. 406; *Rangammal v. Venkatachari* (1895) 18 Mad. 378; *affd.* (1896) 20 Mad. 323; *Yaramati v. Chundru* (1897) 20 Mad. 326; *Kondeti Kama Row v. Nakamma* (1908) 31 Mad. 485; *Raghavulu v. Adinorayana* (1908) 32 Mad. 323; *Goberdhan Singh v. Ritu Roy* (1896) 23 Cal. 962; *Banka Behary Dass v. Itaj Kumar Dass* (1899) 27 Cal. 231; *Govinda Kuar v. Lala Kishun Prosad* (1900) 28 Cal. 370; *Jadu Nath Poddar v. Rup Lal Poddar* (1906) 33 Cal. 967 (the portion of the head-note stating that 11 Bom. 708 and 20 Mad. 326 have been dissented from is misleading: see per Rampini, J., on p. 969, and per Mookerjee, J., on p. 983); *Mussammatal Roshun v. Muhammad* (1887) Punj. Rec. no. 46; *Piritha Das v. Hira Singh* (1898) Punj. Rec. no. 63; *Girdharlal v. Manikamma* (1914) 38 Bom. 10.

(z) *Muthuraman Chetty v. Krishna Pillai* (1906) 29 Mad. 72.

(a) See Trusts Act, s. 84, and Specific Relief Act, s. 35 (b), and illustration thereto. See also *Sham Lal Mitra v. Amarendra Nath Bose* (1895) 23 Cal. 460.

(b) *Parasullah v. Chandra Kanta* (1917) 21 Cal. W. N. 979.

(c) *Dayabhai Tribhovandas v. Lakshimichand Panachand* (1885) 9 Bom. 358, 362; *Srikakolapu v. Gudivada* (1918) 34 Mad. L. J. 561.

(d) *Krishnan v. Sankara Varma* (1886) 9 Mad. 441; *Jijibhai v. Nagji* (1909) 11 Bom. L. R. 693; *Haribhai v. Nathubhai* (1914) 38 Bom. 249; *Javerbhai v. Gordhan* (1915) 39 Bom. 358; *Bai Diwali v. Umedbhai* (1916) 40 Bom. 614, the last four being cases under the Bombay Bhagdari Act V of 1862. The word "illegal", which is frequently applied to transfers of this character, is not the proper word in such a case; the attempted transfer is a nullity.

s. 66. "When a contract becomes void."—The expression "becomes void" includes cases of the kind contemplated by the second clause of s. 56. [See notes on s. 56 under the head "Refund" and the notes below under the head "Received any advantage".] It was deemed applicable by the High Court of Bombay (e) to the case of a lease which was terminated by the lessee under the provisions of the Transfer of Property Act on the destruction of the property by fire. In that case the plaintiff hired a godown from the defendant for a period of twelve months and paid the whole rent to him in advance. After about seven months the godown was destroyed by fire, and the plaintiff claimed a refund from the defendant of a proportionate amount of the rent, and subsequently brought a suit for the same. The Court held that the provisions of s. 108 (e) of the Transfer of Property Act applied to the case, and that the plaintiff was entitled under this section to recover the rent for the unexpired part of the term. The demand for a refund was treated by the Court as a notice to the defendant avoiding the lease (f). It was also stated in the judgment that the right to compensation under this section does not depend on the possibility of apportionment (g). Section 108 of the Transfer of Property Act provides that, in the event of the property let being destroyed by fire, "the lease shall at the option of the lessee be void."

Contracts with corporations.—This section does not apply to cases where a person agrees to supply goods to, or do some work for, a municipal corporation, and goods are supplied or the work done in pursuance of the contract, but the contract is required by the Act under which the corporation is constituted to be executed in a particular form, and it is not so executed. In such cases (h) the corporation cannot be charged at law upon the contract, though the consideration has been executed for the benefit of the corporation. "The Legislature has made provisions for the protection of ratepayers, shareholders and others who must act through the agency of a representative body by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the

(e) *Dhuramsey v. Ahmedbhai* (1898) 23 Bom. 15. hard's notes to s. 65.

(f) See s. 66, p. 372, post.

(g) Citing *Cunningham and Shep-*

(h) *Young & Co. v. Corporation of*

Royal Leamington Spa (1883) 8 App.

Ca. 517.

importance of the seal. It is idle to say there is no magic in a wafer. . . The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement" (i). This decision was followed by the High Court of Allahabad in *Radha Krishna Das v. The Municipal Board of Benares* (j). The plaintiff had supplied to the defendant municipality stone ballast for metalling the municipal roads in accordance with his tender, which had been accepted, but the contract was not in writing signed by the chairman and secretary of the municipality, as required by the Municipal Act (k). The plaintiff sued the municipality for the value of the materials supplied (l), and for damages for refusing to accept delivery of the rest of the ballast. It was held that the plaintiff was not entitled to recover; the contract, not having been committed to writing and signed as required by the Municipalities Act, could not form the basis of any suit against the municipality, notwithstanding that ballast was supplied in pursuance of it. It was also held that the section did not apply, as the case was not one where the agreement was "discovered to be void," or had "become void," within the meaning of the section. This decision is in obvious conflict with a prior decision of the High Court of Bombay (m). In that case the Municipality of Trimbak granted to the defendant the right of levying and collecting certain tolls for a period of fourteen months, for which the defendant agreed to pay to the municipality Rs. 15,001. The contract was required by the Bombay District Municipal Act (n) to be sealed with the seal of the municipality, but it was not so sealed. The defendant levied and collected the tolls and paid part of the agreed amount, but failed to pay the balance, for which the municipality brought a suit against him. The defence was (1) that the municipality had dispensed with the payment of the amount claimed, and (2) that the contract, not being under seal, was unlawful within

S. 65.

(i) *Ibid.*, per Lord Bramwell, at p. 528. The "wafer" is the common modern substitute for a waxen seal.

(j) (1905) 27 A.H. 592.

(k) N.-W. P. and Oudh Municipalities Act XV of 1883, s. 40, and Local Act No. 1 of 1900, s. 47.

(l) The municipality had in this case paid the plaintiff for a part of the bal-

last supplied to them, and as to another part supplied to them they deposited Rs. 1,004 in Court, as the plaintiff claimed more. The rest of the ballast was not accepted as being of inferior quality.

(m) *Abaji Sitaram v. Trimbak Municipality* (1903) 28 Bom. 66.

(n) Bombay Act II of 1884, s. 30.

- S. 65.** the meaning of s. 23, as, if enforced, it would defeat the provisions of the Act, and that it could not therefore be enforced against the defendant, though the consideration had been executed for his benefit. The defence failed on the first point for reasons that have been reproduced in the notes to s. 63 (o). It failed on the second point on the ground thus stated in the judgment: "It is a well recognised law in England that though a contract by a corporation must ordinarily be under seal, still where there is that which is known as an executed consideration an action will lie, though this formality has not been observed. Notwithstanding s. 23 of the Indian Contract Act, we see no reason for not adopting the same view of the law here. For we think, when regard is had to the principle on which the English Courts have proceeded, it is clear we do not run contrary to any provision of s. 23 of the Contract Act in holding that in this country too, as in England, where there is an executed consideration, a suit will lie even in the absence of a sealed contract." The above statement of the law was characterised by the Allahabad High Court in *Radha Krishna Das's* case as too wide. "According to the ruling of the House of Lords," the Court said (p), "to which we have referred, an action will not lie in England against a corporation which is governed by an Act such as the Public Health Act of 1875 in the absence of a sealed contract, even though there is an executed consideration." The reference to s. 23 of the Contract Act seems to be irrelevant. If the plaintiff was disabled from suing, it was by the Bombay District Municipal Act, and the real question was whether that Act was imperative and not subject to any implied exception in a case where the consideration had been executed in favour of the municipality.

At all events, where a contract which fails to comply with the statutory formalities is only executory, neither party can enforce performance against the other (q).

"Any person."—The obligation under this section to restore the advantage received under an agreement is not confined to parties to the agreement, but extends to any person that may have received the advantage (r).

(o) See notes to s. 63 under the head "Remission of performance," p. 357, above.

(q) *Ahmedabad Municipality v. Sulemanji* (1903) 28 Bom. 618.

(r) *Girraj Baksh v. Kazi Hamid Ali* (1886) 9 All. 340, 347.

(p) (1905) 27 All. at p. 600.

Limitation.—Where an agreement is discovered to be void the period of limitation for a suit for a restoration of the “advantage” under this section runs from the date of such discovery. It was so laid down by the Privy Council in *Bassu Kuar v. Dhun Singh* (s). In that case A. agreed to sell his land to B. in consideration of a debt due by him to B. on accounts stated. B. having declined to complete the purchase, A. brought a suit for specific performance, in which it was held that the agreement was unenforceable. B. then sued A. to recover the amount due to him. If the suit was regarded as one falling within article 61 of the Limitation Act for money due on accounts stated, it was barred by limitation under that article. On the other hand, if the suit was one for money paid upon an existing consideration which afterwards failed, it was within the period of limitation, as it was brought within three years from the date of the failure of consideration. The Privy Council took the latter view, stating that the agreement for the purchasing of land was *discovered to be void* when it was decreed to be ineffectual in the suit for specific performance, and that the consideration, therefore, failed when the decree was made, which imposed an obligation upon A. under this section to return the consideration money retained by him, and conferred a corresponding right on B. to recover the amount within three years from the date of the decree.

“Received any advantage.”—This, it is submitted, does not include a case where a plaintiff has abandoned an entire contract and left unfinished work—buildings on the defendant’s land, for instance—in such circumstances that the defendant cannot help keeping it; for here, in English law, there is nothing to show a fresh contract to pay the actual value of what has been done, as there would be if the defendant had kept goods which he might have returned (t); and no reason appears why the same principle should not hold in India.

In England, where a contract becomes impossible for performance by the destruction of the subject-matter or the failure of an event or state of things contemplated as the foundation of the contract to happen or exist (see on s. 56, above), the rule is that the parties are excused from further performance and acquire no rights of action, so that each

(s) (1888) 11 All. 47; L. R. 15 Ind. 157, is a similar case.
 Ap. 211; followed in *Udit Narain v. Sumpter v. Hedges* [1893] 1 Q. R. Muhammad (1903) 25 All. 618. *Hingam* 673 C. A.
Lal v. Mansa Ram (1894) All. W. N.

ss. 65-67. must bear any loss or expense already incurred, and cannot recover back any payment in advance (u). The present section appears to include such cases so far as they fall within s. 56, and not to lay down any special rule with regard to them. It would seem, therefore, that the general rule of this section applies to such cases, and that, contrary to the English decisions, each party is bound to return any payment received. Justice, it is submitted, could be most nearly done by treating such payments as returnable, but allowing to either party compensation for anything reasonably done by him towards performance, whether the other party actually derived any advantage from it or not; but neither the English nor the Indian rule will yield this result, unless indeed the Indian Courts are prepared to take a bold step of applying s. 70 to acts done, at the time, under a subsisting express contract.

66.—The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Mode of communicating or revoking rescission of voidable contract.

67.—If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Effect of neglect of promisee to afford promisor reasonable facilities for performance.

Illustration.

A. contracts with B. to repair B's house.

B. neglects or refuses to point out to A. the places in which his house requires repair.

A. is excused for the non-performance of the contract, if it is caused by such neglect or refusal.

Refusal or neglect of promisee.—The illustration is apparently founded on *Makin v. Watkinson*, decided by the Court of Exchequer in 1870 (v). There the question was, in effect, whether a covenant by the lessor of a building with the lessee to repair the main walls, main timbers, and roofs was to be taken as absolute, or as implying that

(u) *Appleby v. Myers* (867) L. R. 2 C. P. 651; *Civil Service Co-operative Society v. General Steam Navigation Co.* [1903] 2 K. B. 756 C. A.; subject to any express agreement, *Elliott v. Crutchley* [1906] A. C. 7. (v) L. R. 6 Ex. 25.

the lessor was entitled to have notice from the lessee of any want of repair. The majority of the Court held that it must be read as a covenant to repair on notice, as the lessor had no sufficient and reasonable means of ascertaining for himself what repairs were necessary. Perhaps a case more exactly in point is that of an apprentice, whom a master workman has undertaken to teach his trade, refusing to let the master teach him. "It is evident that the master cannot be liable for not teaching the apprentice if the apprentice will not be taught" (w). Conversely, if a master undertakes to teach several trades, and gives up one of them, the apprentice need not stay with him. "If the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve" (x).

CHAPTER V.

OF CERTAIN RELATIONS RESEMBLING THOSE CREATED BY CONTRACT.

68.—If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Claim for necessaries supplied to person incapable of contracting, or on his account.

Illustrations.

(a) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

(b) A supplies the wife and children of B, a lunatic, with necessaries suitable to their condition in life. A is entitled to be reimbursed from B's property.

Minors.—Since the decision of the Judicial Committee in *Mohori Bibi v. Dhurmodas Ghose* (y) it is clear that this section applies to minors as well as to persons of unsound mind (see the illustrations) and

(w) *Raymond v. Minton* (1866) L. R. 1 Ex. 244.

(x) *Ellen v. Topp* (1851) 6 Ex. 424, 442; 86 R. R. 353. The use of the word "stipulated" is incorrect. A man stipulates for what he is to be entitled

to, not for what he is to perform. The term is proper to Roman law, and is better avoided in our system.

(y) (1903) 30 Cal. 593; L. R. 30 Ind. Ap. 114.

68, 69. others, if any, disqualified from contracting by any law to which they are subject. It is therefore needless to consider the doubts expressed in earlier Indian cases.

“Necessaries.”—Costs incurred in successfully defending a suit on behalf of a minor in which his property was in jeopardy are “necessaries” within the meaning of this section (z). And so are costs incurred in defending him in a prosecution for dacoity (a). So also is a loan to a minor to save his property from sale in execution of a decree (b). Money advanced to a Hindu minor to meet his marriage expenses are “necessaries,” and may be recovered out of his property (c). Similarly, money advanced to the manager of a joint Hindu family, who was a minor at the date of the loan, for the marriage of his sister, has been held to be money supplied for necessities, and recoverable from the joint family property. This decision rests on the duty imposed by the Hindu law on the manager of a joint family to provide for the marriage expenses of the female members of the family (d).

As to the definition of necessities in general, see notes to section 11, under the head “Necessaries,” p. 76, above.

Reimbursement
of person paying
money due by
another, in pay-
ment of which he
is interested.

69.—A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration.

B. holds land in Bengal, on a lease granted by A., the zamindar. The revenue payable by A. to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of such sale will be the annulment of B.'s lease. B. to prevent the sale and the consequent annulment of his own lease, pays to the Government

(z) *Watkins v. Dhunoo Baboo* (1881) 7 Cal. 140. In this case the suit was brought by an attorney appointed by the guardian *ad litem* of the minor to recover his costs from the minor. The attorney was engaged by the guardian, and no question was raised as to whether under the circumstances the suit would lie against the minor. In *Branson v. Appasami* (1894) 17 Mad. 257, it was held under similar circumstances that the suit would not lie. See also *Venkata*

v. Timmayya (1898) 22 Mad. 314.

(a) *Sham Charan Mal v. Chowdhry Debya Singh* (1894) 21 Cal. 872. See also *Sundaraja Ayyangar v. Pattana- thusami Tevar* (1894) 17 Mad. 306.

(b) *Kidar Nath v. Ajudhia* (1883) Punj. Rec. no. 185. See also *Atmaram v. Hunar* (1888) Punj. Rec. no. 96.

(c) *Pathak Kali Charan v. Ram Deni Ram* (1917) 2 Pat. L. J. 627.

(d) *Nardan Prasad v. Ajudhia Prasad* (1910) 32 All. 325.

the sum due from A. A. is bound to make good to B. the amount so paid. B.

English law.—This section lays down in one respect a wider rule than appears to be supported by any English authority. The words "interested in the payment of money which another is bound by law to pay" might include the apprehension of any kind of loss or inconvenience, or at any rate of any detriment capable of being assessed in money (*c*). This is not enough, in the Common Law, to found a claim to reimbursement by the person interested if he makes the payment himself. Authoritative statements in English books are much more guarded, for example: "If A. is compellable to pay B. damages which C. is also compellable to pay B., then A., having been compelled to pay B., can maintain an action against C. for money so paid, for the circumstances raise an implied request by C. to A. to make such payment in his case. In other words, A. can call upon C. to indemnify him" (*f*).

It will be observed that the obligation had to be stated as a fictitious contract in order to find a place for it within the rules of common law pleading. The meaning is that C., who did not in fact ask A. to pay, is treated as if he had done so. In jurisdictions where the old rules of pleading have been abrogated, or were never in force, the fiction is superfluous, and the duty may be expressed, as in this section, in plain and direct terms. The late Mr. Leake did this in language which has been made authoritative by high judicial approval:—

"Where the plaintiff has been compelled by law to pay, or, being compelled by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount" (*g*).

(*e*) The view propounded in the text was adopted by Stanley, C.J., in *Tulsa Kunwar v. Jageshwar Prasad* (1906) 28 All. 563, by the Madras High Court in *Subramania Iyer v. Rungappa* (1909) 33 Mad. 232 and by the Calcutta High Court in *Pankhabati v. Nani Lal* (1914) 18 Cal. W. N. 778, 781, see also *Sattya Bhusan v. Krishna* (1914) 18 Cal. W. N. 1308, 1310-1311; *Muthurakku v. Rakappa* (1914) 26 Mad. L. J. 66, 70-71.

(*f*) *Bonner v. Tettenham, etc., Building Society* [1898] 1 Q. B. 161, 167, per A. L. Smith, L.J.

(*g*) Adopted by Cockburn, C.J., in the Ex. Ch., *Moule v. Garrett* (1872) L. R. 7 Ex. 101, 104 and Vaughan Williams, L.J., in *Bonner's Case* (last note) at p. 173. The learned author's words are altered in the current edition of Leake on Contracts (p. 43), but the sense is unaffected.

8. 69. Such a right to indemnity arises where one man's goods are lawfully seized for another's debt, *e.g.*, as being liable to distress, and are redeemed by the owner; the owner will be entitled to indemnity from the debtor, though he may have exposed his goods to the risk of distress by a voluntary act not done at the debtor's request or for his benefit (*h*).

But the English authorities do not cover a case where the plaintiff has made a payment operating for the defendant's benefit, but was not under any direct legal duty to do so, nor where the defendant was not bound to pay, though the payment was to his advantage. The assignee of a term of years mortgaged the premises by sub-lease. The mortgagees took possession, but did not pay the rent due under the principal lease. The original lessees, who of course remained liable to the lessors, had to pay the rent, and sued the mortgagees to recover indemnity. It was held that the action did not lie (*i*), for there was no obligation common to the plaintiff and the defendant. It was to the mortgagees' interest that the rent should be paid, but no one could call on them to pay it. This case, it would seem, would be decided in the same way under the present section. The words "bound by law to pay," as they fix the limit of the law in India, mark the point beyond which the Court of Appeal refused to extend it in England.

"Pereon . . . interested in the payment of money."—This section only applies to payments made *bonâ fide* for the protection of one's own interest. A person may be interested in the payment, but if in making the payment he is not actuated by the motive of protecting his own interest, he cannot recover under this section (*j*). Thus where A. purchases property from B., but the sale is *fictitious*, A. cannot recover from B. money paid by him to save the property from being sold in execution of a decree against B. (*k*). It is otherwise, however, if the sale is *bonâ fide* (*l*). A putnidar who makes payments on account of Government revenue due by his superior landlord who had failed to pay the same, is entitled to recover under this section, even though the risk to his putni

(*h*) *Edmunds v. Wallingford* (1885) 14 Q. B. Div. 811, disapproving *England v. Marsden* (1866) L. R. 1 C. P. 529.

(*i*) *Bonner's Case* [1893] 1 Q. B. 161, 167.

(*j*) See *Desai Himatsingji v. Bhavabhai* (1880) 4 Bom. 643, at p. 652.

(*k*) *Janki Prasad Singh v. Baldeo Prasad* (1908) 30 All. 167.

(*l*) *Subramania Iyer v. Rungappa* (1909) 33 Mad. 232.

may be remote, provided he had *some* interest in making the payment (m). Payment made by the darputnidar of a share of a putni of the whole rent due on the putni to save it from being sold in execution of a decree obtained by the landlord in a suit for arrears of rent comes within this section, though the suit was brought against some only and not all of the putnidars (n). Similarly, where A.'s goods are wrongfully attached in order to realise arrears of Government revenue due by B., and A. pays the amount to save the goods from sale, he is entitled to recover the amount from B. (o). A Hindu reversioner is interested in the payment of arrears of Government revenue which a Hindu widow is bound to pay in respect of property in which she has a widow's estate, and he is entitled to recover the same from the widow (p). So also is he interested in making a deposit under O. 21, r. 89, of the Code of Civil Procedure, to have a sale in execution of a decree against a Hindu widow set aside, the sale being of the entire interest in the property sold and not merely the widow's interest (q). A Hindu mother who has incurred expenses for her daughter's marriage is entitled to recover the expenses from her husband's co-parceners. The liability of the co-parceners is clearly one which arises under the Hindu law, but it has been said, though not without some difference of opinion, that it also arises under this section (r). Where A. makes a gift of a portion of land to B. himself undertaking to pay the *judi* in respect of it, and then makes a gift of the rest of the land to C. subject to the condition that C. shall pay the *judi* in respect of the

(m) *Smith v. Dinonath* (1885) 12 Cal. 213; *Bama Sundari Dasi v. Adhar Chunder* (1894) 22 Cal. 28. And see *Nath Prasad v. Baij Nath* (1880) 3 All. 66; and *Krishno Kamini Chowdhurani v. Gopi Mohun* (1888) 15 Cal. 652 (where the point actually decided was that cases falling within ss. 69 and 70 are cognisable by a Court of Small Causes in the *Mufassal*). *Op. Ajudhia Prasad v. Bakar Sajjad* (1883) 5 All. 400, cited in the commentary on s. 70.

(n) *Rajani Kanta v. Haji Lal* (1917) 21 Cal. W. N. 628.

(o) *Tulaa Kunwar v. Jagdish Prasad* (1906) 28 All. 503; *Khusal Singh v. Khawani* (1906) All. W. N. 282. The

decision in *Chunia v. Kundan Lal* (1882) All. W. N. 149, 150, where it was held that a vendor, who had paid under compulsion arrears of revenue payable by the purchaser, was not entitled to recover from the purchaser, cannot now be supported, having regard to the decisions in the above cases.

(p) *Sambusiva v. Seethalakshmi* (1909) 19 Mad. L. J. 331.

(q) *Pankhabati v. Nani Lal* (1914) 18 Cal. W. N. 778.

(r) *Vaikuntam v. Kallapiram* (1900) 23 Mad. 512; (1902) 26 Mad. 497; *Acha Ranganaikammall v. Acha Ramnuja* (1911) 35 Mad. 728, 737.

- §. 69. whole land, B. is entitled, on failure of C. to pay the *judi*, to make the payment and to recover it from C. (s).

It is enough for a person claiming under the provisions of this section to show that he had an interest in paying the moneys claimed by him *at the time of the payment*. Thus moneys paid by a person while in possession of an estate under a decree of a Court to prevent the sale of the estate for arrears of Government revenue may be recovered by him under this section, even though the decree may be subsequently reversed and he may be deprived of possession (t). In the case now cited the Judicial Committee said :—" It seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payment for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment if he has failed through no fault of his to reimburse himself out of the rents " (u). Conversely, payment of kist made by a person who had obtained a decree for possession of certain lands may be recovered back by him, though the payment may have been made when he was not yet put into possession pending an appeal and a second appeal (v). Similarly, moneys paid by a mortgagee of a putni tenure to save the tenure from sale for arrears of rent pending *bona fide* litigation between him and his mortgagor relating to the amount of the mortgage debt may be recovered back under the provisions of this section, even though it may be eventually found by the Court that the whole of the mortgage debt was as a matter of fact satisfied before the date of payment (w). In a still later case (x) the plaintiff purchased a putni taluk at a sale held under Regulation VIII of 1819 at the instance of the zamindar for non-payment of rent by putnidars. The sale was set aside in May, 1894, in a suit brought by the putnidars for the purpose against the zamindars and the plaintiff. The zamindar alone appealed against the decision, and pending the appeal the zamindar

- (s) *Somashastry v. Swamirao* (1918) 42 Bom. 93; *Chandra Deo v. Srinivasa* (1915) 38 Mad. 235, 239.
 (t) *Dakhina Mohan Roy v. Saroda Mohan Roy* (1893) 21 Cal. 142; 20 L. R. Ind. Ap. 160.
 (u) 21 Cal. at p. 148.
 (v) *Chinnasamy v. Rathnasabapathy* (1903) 27 Mad. 338.
 (w) *Bindubashini Dassi v. Harandra Lal Roy* (1897) 25 Cal. 305; *Serafat Ali v. Sheikh Israr Ali* (1917) 22 Cal. W. N. 347.
 (x) *Radha Madhub Samonta v. Sasi Ram Sen* (1899) 26 Cal. 826.

called upon the plaintiff to pay rent that had accrued from April, 1894, to November, 1894. The plaintiff thereupon paid the rent, and in a suit by him against the putnidars it was held that he was entitled to be reimbursed the amount by them. The fact that the decision of the first Court was in favour of the defaulting putnidars did not affect the plaintiff's right to pay the rent, as it was quite possible that that decision might have been reversed on appeal. But a person in wrongful possession of land making payment of Government revenue is not interested within the meaning of this section (y). A. agrees to sell land to B. Subsequently A., in breach of the agreement, agrees to sell the land to C. B. sues A. and C. for specific performance. Pending the suit the land is sold in execution of a decree obtained by A.'s creditor against A. B. deposits in Court the amount required to be deposited under O. 21, r. 89 of the Code of Civil Procedure, and the sale is thereupon set aside. B., having no title in the property and no possession in it at the time of the payment, was not interested in the payment and he is not entitled to recover it from A. or C. (z).

In *Ram Tuhul Singh v. Biseswar Lal* (a) the Judicial Committee, in dealing with the rights of parties making payments, observed: "It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a *voluntary* payment by A. of B.'s debt." Thus a mortgagor who voluntarily pays the assessment on land mortgaged by him, forestalling the mortgagee in possession, who, it is found, was willing to pay the assessment as he had done for years past, is not entitled to recover from the mortgagee the amount so paid by him (b). Similarly, payment made by a mortgagee to prevent the sale of the mortgaged property in execution of a decree

(y) *Binda Kuar v. Bhonda Das* 208; L. R. 2 Ind. Ap. 131; *Panchkore v. Hari Das* (1916) 21 Cal. W. N. 394, 399. (1885) 7 All. 660.

(z) *Nand Kishore v. Parao Mian* (b) *Ramchandra Atmaram v. Damodar Ramchandra* (1899) 1 Bom. L. R. (1917) 2 Pat. L. J. 676.

(a) (1875) 23 W. R. 306; 15 B. L. R. 371.

8. 69. against the mortgagor cannot be recovered from the mortgagor, if the mortgage was *prior* to the execution proceedings (c). And where A., B.'s nephew, believing that he was the heir of B., paid the amount of a decree held by C. against B. to prevent the sale of B.'s property, and it was subsequently declared in a suit that A. was not B.'s heir, it was held by the High Court of Allahabad that the payment made by A. was a purely voluntary and gratuitous one, and as such could not be recovered (d). This decision does not appear to be in accord with later decisions of the same Court (e).

Suit for contribution.—Whether this section applies to a suit for contribution where *both* the plaintiff and the defendant were liable for the money paid by the plaintiff is not clear on the authorities (f). In *Mothooranath v. Kristokumar* (g), where portions of a property subject to a mortgage were purchased by the plaintiff and the defendant, respectively, and the plaintiff alone paid the entire amount of the mortgage debt to prevent the estate from sale, it was held by the Calcutta High Court that the plaintiff was a person interested in the payment within the meaning of this section, and that he was entitled to contribution from the defendant. In a subsequent case the same High Court doubted whether a suit for contribution in respect of money for which the plaintiff and the defendant in the contribution suit had been made jointly liable by a former decree fell within the scope either of this or the next following section (h). The Court was inclined to think that those sections seemed rather to contemplate persons who, not being themselves bound to pay the money or to do the act, did it under circumstances which gave them a right to recover from the person who had allowed the payment to be made and had benefited by it. In a still later case (i), where one co-sharer of land sued another co-sharer for contribution for rent of the

(c) *Ram Prasad v. Salik Ram* (1882) All. W. N. 210.

(d) *Sumar Singh v. Shib Lal* (1882) All. W. N. 140.

(e) *Khushal Singh v. Khawani* (1906) All. W. N. 282; *Tulsa Kunwar v. Jageshwar Prasad* (1906) 28 All. 563.

(f) As to contribution between joint promisors and co-sureties, see ss. 43 and 146.

(g) (1878) 4 Cal. 369.

(h) *Futleh Ali v. Gunganath Roy* (1881) 8 Cal. 113, 116. No reference was made in the judgment to the case cited above. See also *Nawab Mir Kamaludin v. Partap Mota* (1880) 6 Bom. 244, where it was held that the section did not apply.

(i) *Swarnamoyee Debi v. Hari Das Roy* (1902) 6 C. W. N. 903.

land paid by him, it was held that the plaintiff was not entitled to recover under this section, as the defendant was wrongfully kept out of possession by the plaintiff. But for that circumstance, it was said, contribution could have been recovered. The Court observed: "It seems to us that the provisions of s. 69 of the Indian Contract Act, upon which the plaintiff founds his right of suit, are not applicable to such a suit as the present. That section, we think, contemplates a case in which there are several co-sharers in possession of land and where some of them having neglected to pay what is due from them in respect of the occupation of the land, one of their number pays what is due from all. He may then recover contribution from the rest. But here the plaintiff sues to recover expenses which he had by the wrongful appropriation of the profits of the defendant's share already received." Still later the opinion was expressed that the section contemplates only those cases where payment is made by a person under no legal liability to make it, and for another person who is bound in law to pay it (j). The view taken in the most recent cases is that this section applies to suits for contribution where *both* the plaintiff and the defendant were liable for the money paid by the plaintiff (k). This view, it is submitted, is sound. The section is general in its terms, and there is no reason why attempts should be made to restrict its operation. In any event suits of this character would come within the scope of s. 70. See notes to s. 70 under the head "Contribution," p. 386, below.

S. 69

The Madras High Court has held that this section does not apply to suits for contribution at all (l).

"Money which another is bound by law to pay."—In *Mothooranath, v. Kristokumar (m)*, above cited, it was contended that this section applied only to cases where the person who is there called "the other" was personally liable for the debt, and that it did not apply where, as in that case, the liability attached to the land. The Court overruled this contention and said:—"It is clear from the illustration that that

(j) *Manindra v. Jamahir* (1905) 32 Cal. 643, at p. 645; *Jinnat Ali v. Fateh Ali* (1911) 15 Cal. W. N. 332, at p. 334.

(k) *Ram Lal v. Khiroda Mohini* (1913) 18 Cal. W. N. 113; *Prosunno Kumar v. Jamaluddin* (1913) 18 Cal.

W. N. 327.

(l) *Jagapati Raju v. Sadrusannama Arad* (1916) 39 Mad. 795, 800-803.

(m) (1878) 4 Cal. 360, followed in *Chandradaya v. Bhagaban* (1916) 23 Cal. L. J. 125.

- S. 69. is not the intention of the Legislature. The illustration gives the case of a lessee paying off revenue due to Government ; but the liability to pay revenue due to Government is not a personal liability of the zamindar, but a liability which is imposed upon the zamindar's land. It is therefore clear that that section was intended to include the cases not only of personal liability, but all liabilities to payments for which owners of lands are indirectly liable, those liabilities being imposed upon the lands held by them."

"Bound by law."—The liability for which payment may be made under this section need not be a statutory one. In a Calcutta case cited above (n) it was argued that the words "bound by law" restricted the section to liabilities created by some statute, such as liabilities to pay revenue, but excluded liabilities which arose out of contracts by parties. The Court declined to uphold this contention and observed: "That would be putting on the section far too narrow a construction, because it was no doubt intended to include such a case as a lessee paying rent to the superior landlord for which the intermediate lessee was liable under a covenant."

An action to recover money paid is not maintainable under this section unless the person from whom it is sought to be recovered was bound *by law to pay* it. Thus revenue due on land owned by one who is not the registered holder is not money which such an owner is bound to pay under the Madras Revenue Recovery Act 11 of 1864, though it may be to his interest to do so, and the registered holder voluntarily paying such revenue cannot recover it under this section (o). Similarly, payments made by a second mortgagee to save the mortgaged property from sale in execution of a decree for rent obtained by the zamindar against the mortgagor under the Bengal Tenancy Act cannot be recovered by him from the first mortgagee, as the latter is not bound under s. 69 of that Act to pay the rent due by the mortgagor to the zamindar (p). And where the income-tax authorities assessed the widow of a deceased Hindu in respect of outstandings forming part of the estate of the deceased, notwithstanding remonstrances on her

(n) *Mothooranath v. Kristokumar* 41; *Puthempurayal v. Mangalasseri* (1878) 4 Cal. 369, 373. (1912) 24 Mad. L. J. 548.

(o) *Boja Sellappa Reddy v. Vridha-chala Reddy* (1907) 30 Mad. 35; *Subramania v. Mahalingasami* (1909) 33 Mad. (p) *Gangadas v. Jogendra* (1907) 11 C. W. N. 403.

part that the outstandings had not come to her, but had been bequeathed under the will of the deceased to the defendants, and the widow paid the tax, it was held that she could not recover the amount from the defendants under this section, for the defendants, not being the parties assessed, were not "bound by law" to pay the tax (g). In a recent Calcutta case, A. mortgaged his interest in a patni taluk to K. A. then sold his interest in the taluk to B., who got his name registered in the zamindar's books in place of A. Subsequently the zamindar threatened to sell the taluk for arrears of rent, whereupon K. paid the amount to save his interest in the taluk. K. then sued B. to recover the amount from B. B. contended that he was only a benamidar for A., and that he was not therefore bound to pay the rent. But this contention was overruled, and it was held that B. having held himself out as a purchaser, he was *primâ facie* bound to pay the rent, and that K. was entitled to recover the amount from him under this section (r).

Purchase of property subject to payment of encumbrances.—A person purchasing property *subject* to a charge is alone liable to pay it off, and he is not therefore entitled to recover the amount paid by him from the person originally liable in respect thereof. Thus the purchaser of a patni taluk at a sale in execution of a decree against the holder thereof is bound by law to pay all arrears of rent due to the zamindar at the time of sale. If the purchaser pays the arrears to save the taluk from sale at the instance of the zamindar, he cannot recover the amount from the patnidar, though the patnidar enjoyed the profits of the patni during the period for which the rent had become due (s). Similarly, a person who buys immovable property subject to a charge for maintenance in favour of a widow cannot recover from the vendor maintenance money paid by him to the widow to save the property from sale at the instance of the widow (t).

Payment must be to another person.—This section applies only where one person pays to *another* money which a third party is bound to

(g) *Raghavan v. Alamelu Ammal* (1907) 31 Mad. 35. Compare *Kishan Lal v. Megh Singh*

(r) *Umesh Chandra Banerjee v. Khulana Loan Company* (1907) 34 Cal. 22. (t) *Mangalathammal v. Narayana-*

swami Aiyar (1907) 17 Mad. L. J. 250.

(s) *Manindra Chandra Nandy v.*

Sec. 69, 70. *pay.* In *The Secretary of State for India v. Fernandes* (u), there was certain land in South Canara which was held by the Government at a certain rent as *mulgaindar* (permanent tenant) under a *mulgar* (landlord). Arrears of revenue were due from the *mulgar* to Government, and the Government, to prevent the land from being sold for the arrears, paid as *mulgaindar* or rather retained the arrears due to itself. It was held that, having made the payment to itself, the Government could not recover the sum from the *mulgar* under this section.

Remedies against wrong doer.—Neither this section nor s. 70 refers in any way to remedies against wrong doers (v).

70. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Obligation of person enjoying benefit of non-gratuitous act.

Illustrations.

(a) A, a tradesman, leaves goods at B's house by mistake. B. treats the goods as his own. He is bound to pay A. for them.

(b) A. saves B's property from fire. A. is not entitled to compensation from B. if the circumstances show that he intended to act gratuitously.

Non-gratuitous act done for another.—This section goes far beyond English law (w). By the Common Law, if goods, work, or anything valuable be offered in the way of business and not as a gift, the acceptance of them is evidence of an agreement—a real, not a fictitious, agreement, though it need not be expressed in words—to pay what the consideration so given and taken is reasonably worth. A man is not bound to pay for that which he has not the option of refusing. Under this section it would seem that whoever finds and restores lost property, apart from any question of a reward having been offered, is entitled to compensation for his trouble if he did not intend to act gratuitously.

(u) (1907) 30 Mad. 375. This was 40 Cal. 598.

not the only disputable point, but the case was disposed of on it. (w) This was recognised in *Jarao Kumari v. Basanta Kumar Roy* (1906)

(v) *Kanhaya Lal v. National Bank of India, Ltd.* (1913) L. R. 40 I. A. 56, 66, 32 Cal. 374 at p. 377.

This is certainly not the Common Law rule. Illustration (b) is in accordance, no doubt, with English law, so far as the negative result goes; but the only real analogy is to be found in the maritime law of salvage and in some other very rare cases depending on the same principle. The case of illustration (a) would be decided in the same way, but not quite for the same reason. Either B. has accepted the goods, in which case he cannot be heard to say that they were not intended for him, or he has dealt with them as a mere trespasser, in which case he is liable for their value as damages. This does not apply to the rare but possible case of B. honestly thinking that the goods came from X., of whom he intended to buy such goods. It seems that such a case is within the present section, but by the Common Law B. is not liable to A. for the price of the goods (x).

"Certainly, there may be difficulties in applying a rule stated in such wide terms as is that expressed in section 70. According to the section it is not essential that the act shall have been necessary in the sense that it has been done under circumstances of pressing emergency, or even that it shall have been an act necessary to be done at some time for the preservation of property. It may therefore be extended to cases in which no question of salvage enters. It is not limited to persons standing in particular relations to one another, and, except in the requirement that the act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done" (y). "The terms of [this section] are unquestionably wide, but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract" (z). The section ought not to be so read as to justify the officious interference of one man with the affairs or property of another, or to impose obligations in respect of services which the person sought to be charged did not wish to have rendered (a).

(x) *Boulton v. Jones* (1857) 2 H. & N. 561; 115 R. R. 695.

(y) *Damodara Mudaliar v. Secretary of State for India* (1894) 18 Mad. 88, at p. 91.

(z) *Suchand v. Balaram* (1910) 38 Cal. 1.

(a) *Damodara Mudaliar v. Secretary of*

State for India (1894) 18 Mad. at p. 93; *Muthu Raman v. Chinna Vellayan* (1916) 39 Mad. 965, 970. See also on "Gratuitously" *Ajudhia Prasad v. Bakar Sajjad* (1883) 5 All. 400; *Bama Sundari Dasi v. Adhar Chunder Sarkar* (1894) 22 Cal. 28; *Nathu v. Balwantrao* (1903) 27 Bom. 390, 393; *Suraj Bhai v. Hashmi Begam* (1918) 40 All. 555.

§. 70. An equitable principle resembling that of this section is recognised in the English law of partnership and companies. Where money has been borrowed by one partner in the name of the firm, but without the authority of his co-partners, and applied in paying debts of the firm, the lender is entitled to call on the firm for repayment of the amount so applied (*b*). The rule is treated as somewhat peculiar, and is not likely to be extended.

The rule laid down in this section was suggested by the notes to *Lampleigh v. Braithwait* (*c*), and perhaps indirectly by the Roman law (*d*) (see Whitley Stokes, Introduction to Contract Act, at p. 533).

It is superfluous to add that the section does not apply where an act is done by one person at the *express* request of another. Thus if a client engages a pleader to act for him in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under this section, but because the request implies a promise to pay such remuneration (*e*).

Contribution.—By this section three conditions are required to establish a right of action at the suit of a person who does anything for another : (1) the thing must be done lawfully ; (2) it must be done by a person not intending to act gratuitously ; and (3) the person for whom the act is done must enjoy the benefit of it (*f*). Thus in *Damodaru Mudaliar v. Secretary of State for India* (*g*) eleven villages were irrigated by a certain tank, some of which were zamindari villages, and others were held under Government. The Government effected certain repairs necessary for the preservation of the tank, and it was found that they did not intend to do so gratuitously for the zamindars, and that the latter had enjoyed the benefit thereof. The zamindars were under the circumstances held liable to contribute to the expenses of the repairs (*h*). Similarly, where a notice was issued upon the owners of a

(*b*) Lindley, Partnership, 8th ed. 234 ;
cp. Partnership Act, 1890, s. 24, sub-
s. 2.

(*c*) 1 Smith, L. C. 10th ed. 136.

(*d*) *Per Cur.* in *Damodaru Mudaliar*
v. Secretary of State for India (1894) 18
Mad. 88, 91.

(*e*) *Sibkisor Ghose v. Manik Chandra*
(1915) 21 Cal. L. J. 618.

(*f*) *Damodaru Mudaliar v. Secretary*
of State for India (1894) 18 Mad. 88 ;

Ranjani Kant v. Rama Nath (1914) 19
Cal. W. N. 458, 460.

(*g*) (1894) 18 Mad. 88.

(*h*) It was not found in the case that
there was any request express or im-
plied on the part of the zamindars to
the Government to execute the repairs,
though the Court expressed the opinion
that if the facts were properly ascertain-
ed a request might have been implied :
see 18 Mad. at p. 90.

hāt by the municipality to effect certain improvements, intimating that failure to comply with the notice would lead to a withdrawal of the license granted for holding the *hāt*, and one of the co-sharers effected the required improvements, it was held that he was entitled to contribution from the other co-sharers (*i*). Upon the same principle, where a mortgagee threatened to sell the land mortgaged to him, and one of the co-sharers paid up the mortgage debt to prevent the property from being sold, it was held that he was entitled to contribution from the other co-sharers (*j*). It has similarly been decided that where property held by two or more persons in co-partnership is sold in execution of a decree against them, and one of them deposits in Court the amount required to be deposited under O. 21, r. 89 of the Code of Civil Procedure to have the sale set aside, and the sale is subsequently set aside, he is entitled to contribution from the other co-sharers in respect of the amount deposited by him for payment to the decree-holder (*k*). Also the mere fact that the co-sharer who so deposits the amount was not a party to the suit and decree under which the property was sold does not make any difference in his right to proceed under this section, if the amount has been deposited with the leave of the Court (*l*). It is, however, different, if the person depositing the amount has no interest in the property at all (*m*). It has been held by the Judicial Committee that a co-heir is not bound to contribute towards the expenses of litigation incurred by other co-heirs in respect of the common property, though the litigation may have been carried on *bona fide*, and though he may have benefited by the litigation (*n*). A mortgagee of immovable property can recover from the mortgagor payments made by him for road and public works cesses payable by the mortgagor (*o*). And so where the holder of an inam within a zamindari takes for his benefit Government water, and the zamindar,

(*i*) *Janto Kumari v. Basanta Kumar Roy* (1905) 32 Cal. 374.

(*j*) *Khairat Husain v. Haidri Begam* (1888) All. W. N. 10.

(*k*) *Dori Lal v. Patti Ram* (1911) 8 All. L. J. 622; *Batuk Nath Mandal v. Bopin Bihari Chandhuri* (1912) 16 C. W. N. 975. Both these cases were decided with reference to s. 69 of the Act.

(*l*) *Suchand v. Balaram* (1910) 38 Cal. 1.

(*m*) *Yagombol v. Naina Pillai* (1909) 33 Mad. 15.

(*n*) *Abdul Wahid Khan v. Shaluka Bibi* (1894) 21 Cal. 496; L. R. 21 Ind. Ap. 26; *Halima Bee v. Roshan Bee* (1907) 30 Mad. 526; *Dulla Singh v. Khazana* (1914) Punj. Rec. no. 61 p. 208. See also *Jyani Begam v. Umras Begam* (1908) 32 Bom. 612.

(*o*) *Upendra Chandra Miller v. Tara Prosanna Mukerjee* (1903) 30 Cal. 794.

- S. 70. who is liable in the first instance to pay to the Government the cess for the water so taken, pays the same, he can recover the amount of cess so paid from the inamdar (p). Similarly when one of two joint tenants pays the whole rent to the landlord, he is entitled to contribution from his co-tenant (q).

Neither this section nor s. 69 affects the claim for contribution under s. 82 of the Transfer of Property Act, 1882 (r).

“Lawfully.”—By the use of the word “lawfully” in this section the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person the person doing the act was entitled to look for compensation to the person for whom it was done (s). The word “lawfully” in this section is not mere surplusage. It must be considered in each individual case whether the person who made the payment had any lawful interest in making it, if not, the payment cannot be said to have been made lawfully (t). A payment made by a person fraudulently and dishonestly with the intention of manufacturing evidence of title to land which belonged to the defendant, and to which he knew he had no claim, is not *lawful* within the meaning of this section (u). In such a case it is clear that the payment could also not be regarded as having been made *for* the defendant. Similarly, where a purchaser of property, the sale being fictitious and so found by the Court in a previous litigation, paid the amount of a decree obtained by a third party against his vendor to prevent the property from being sold in execution, it was held that the payment was not “lawfully” made, and that the purchaser could not

(p) *Rajah of Venkatagiri v. Vudutha Subbarayudu* (1907) 30 Mad. 277. 11 All. 234, 243; see *Gordhandal v. Darbar Shri Surajmalji* (1902) 26 Bom.

(q) *Nirdosh v. Jakaria* (1914) 20 Cal. L. J. 492. 504, 518.

(r) *Jagapatiraju v. Sadrusannama* (1916) 39 Mad. 795; *Kunchitha-* (t) *Panchkore v. Hari Das* (1916) 21 Cal. W. N. 394, 399.

patham v. Palamalai (1917) 32 Mad. L. J. 347, 352. (u) *Desai Himatsingji v. Bhavabhai* (1880) 4 Bom. 643, 653. See also *Jinnat Ali v. Fatch Ali* (1911) 15 C. W. N. 332, at pp. 334, 335.

(s) *Chedi Lal v. Bhagwan Das* (1888)

recover it from the vendor (*v*). A payment in satisfaction of a decree, by a person who is a party to the decree and is bound thereby, is a payment made "lawfully" within the meaning of this section (*w*). S. 70

"Does."—This expression includes payment of money. It must not be supposed that because s. 69 provides for the case of payment of money, therefore the present section excludes that case. There may be cases in which a person who is bound to pay a certain sum of money would not necessarily be benefited by its payment by another. Those cases would fall under s. 69, for benefit received by the payment of money is one of the conditions necessary to the application of this section (*x*).

"For another person."—The principle underlying this section was adopted in a Calcutta case (*y*) decided in 1881, but without any reference to the Contract Act. In that case the plaintiffs, *bonâ fide* believing that they were the owners of a four annas share and that the defendants were the owners of the remaining twelve annas share in a putni, paid to the zamindars their share of the revenue. In a suit between the parties it was declared that the plaintiffs had no share in the putni, and that the defendants were entitled to the whole of it. Subsequently the defendants paid to the zamindars the revenue on the twelve annas share only, availing themselves of the payment by the plaintiffs. It was held that upon those facts the plaintiffs were entitled to recover from the defendants the amount paid by them, on the principle that "where a payment is made by one person for the benefit of another, and that other afterwards adopts that payment and avails himself of it, the sum becomes money paid for his use." It is not necessary to the application of this section that the defendant must not only

(*r*) *Janaki Prasad Singh v. Baldeo Prasad* (1908) 30 All. 167. In this case the Court thought that the payment was possibly made with some sinister object; *Panchkori v. Haridas* (1916) 21 Cal. W. N. 394. Contrast *Muridhar v. Bhikhi* (1885) All. W. N. 219; *Mohar Singh v. Sher Singh* (1883) Punj. Rec. no. 42.
(*w*) *Serafat Ali v. Issan Ali* (1918) 45 Cal. 691.

(*x*) *Smith v. Dinonath* (1885) 12 Cal. 213, 217; *Desai Himatsingji v. Bhavabhai* (1880) 4 Bom. 643; *Nath Prasad v. Baij Nath* (1880) 3 All. 66; *Nobin Krishna Bose v. Mon Mohun Bose* (1881) 7 Cal. 573.
(*y*) *Nobin Krishna Bose v. Mon Mohun Bose* (1881) 7 Cal. 573; *Smith v. Dinonath* (1885) 12 Cal. 213; *Upendra Chandra v. Tara Prosanna* (1903) 30 Cal. 794.

- S. 70. have benefited by the payment, but also have had an opportunity of accepting the payment (z). But payment made against the will of the defendant and in the course of a transaction which in one event would have turned out highly profitable to the plaintiff and extremely detrimental to the defendant could not be said to have been made for the defendant, though in the event which took place it may have proved beneficial to him (a). Similarly payment of revenue by the plaintiff while in wrongful possession of the defendant's land and for his own benefit and his own account could not be recovered under this section (b). And it has been held that if A. is assessed by the income-tax authorities and protests that B. is the party properly liable, but pays the tax, A. cannot recover the amount from B., for A. cannot be said to have made the payment "for" B. (c). It is quite clear that where the object of the payment is to benefit the plaintiff himself, the payment cannot be said to have been made "for" the defendant (d). But it is not clear whether the expression "another person" includes a minor. There are no cases in point (e), but there seems to be no reason why on principle the expression should not be interpreted as comprising the case of a minor (f).

The expression "another person" includes a caste. Thus where property belonging to a caste is attached in execution of a decree, and a member of the caste pays to the decree-holder the amount due to him under the decrees to save the property from sale in execution, he is entitled to be reimbursed out of the caste property (g).

(z) *Chandra Deo v. Srinivasa* (1915) 38 Mad. 235, 241, 243; *Saptharishi v. Secretary of State for India* (1915) 28 Mad. L. J. 384, dissenting to that extent from *Yogambal v. Naina Pillai* (1910) 33 Mad. 15; see also *Jognarain v. Badri Das* (1912) 16 Cal. L. J. 156.

(a) *Ram Tuhul Singh v. Biseswar Lal* (1875) 23 W. R. 305; 15 B. L. R. 208; L. R. 2 Ind. Ap. 131.

(b) *Binda Kuar v. Bhonla Das* (1885) 7 All. 660.

(c) *Raghavan v. Alamelu Ammal* (1907) 31 Mad. 35.

(d) *Tangya Fala v. Trimbak Dayal* (1916) 40 Bom. 646, 651.

(e) In *Venkata v. Timmayya* (1898) 22 Mad. 314, it was held that, assuming the section applied to the case of a minor, it did not apply under the particular circumstances of the case. See also *Eranon v. Appasami* (1894) 17 Mad. 257.

(f) Whitley Stokes, *Anglo-Indian Codes*, vol. i. 585, note 3.

(g) *Bhicoobai v. Hariba* (1918) 42 Bom. 556.

Remedies against wrong doer.—Neither this section nor s. 69 refers . 70, 71
in any way to remedies against wrong doer (h).

71.—A person who finds goods belonging to another,
Responsibility of and takes them into his custody, is subject to
finder of goods, the same responsibility as a bailee.

Liability of finder.—The position of a finder in English law, especially with regard to the possibility of his stealing the thing found, has been the subject of many and subtle distinctions. It does not appear useful or desirable to say anything of them here, as it was plainly the object both of the Penal Code and of the Contract Act to get rid of them. Any one who is curious in the matter may be referred to the late Mr. Justice Wright's full discussion of it in relation to the law of theft (i).

The Indian Penal Code (s. 403, *Explanation 2*) provides as follows :

“A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence ; but he is guilty of the offence above defined [criminal misappropriation of property] if he appropriates it to his own use when he knows or has the means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner, and has kept the property a reasonable time to enable the owner to claim it.

“What are reasonable means, or what is a reasonable time in such a case, is a question of fact.

“It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it ; it is sufficient if at the time of appropriating it he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.”

As to the definition of “bailee” see s. 148, below.

(h) *Kanhaya Lal v. National Bank of India Ltd.* (1913) 40 I. A. 56, 66 ; 40 Cal. 598. (i) Pollock and Wright on Possession, 171 sqq.

§. 72.

Liability of person to whom money is paid or thing delivered, by mistake or under coercion.

72.—A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations.

(a) A. and B. jointly owe 100 rupees to C. A. alone pays the amount to C., and B., not knowing this fact, pays 100 rupees over again to C. C. is bound to repay the amount to B.

(b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

Payment under mistake of fact or mistake of law.—The rule of the Common Law is that “money paid under mistake or ignorance of fact may be recovered back where the supposed state of fact is such as to create a liability to pay the money, which in reality is not due,” but “a payment made under the influence of a mistake which does not create a supposed legal obligation, and which therefore as regards the motive of the party is voluntary, cannot be recovered back” (j). In other words, the mistake is material only so far as it leads to the payment being made without consideration, and a wrong reason not affecting the substance of the transaction itself is not a failure of consideration (k). Probably this holds in British India (l).

Mistake of law is not expressly excluded by the words of this section; but s. 21 shows that it is not included. “The man who has chosen to judge his own cause upon all the facts, and has decided against himself, cannot appeal to the Court against his own judgment, whether it was well informed or not” (m). Thus payment made by

(j) Leake, 65.

(k) *Balfour v. Sea Fire Assurance* (1857) 3 C. B. N. S. 300; 111 R. R. 663.

(l) Where a lessee, on the lessor's death, pays rent to the lessor's widow, erroneously believing that the rent was payable to her, and he has to pay the rent over again to the lessor's executors, he is entitled to a refund of the amount paid by him to the widow: *Ram Kishan v. Rani Bhagwan Kaur* (1906) Punj.

Rec. no. 131. It must be assumed that the circumstances were such as to prevent the mistake from being a mere mistake of law. But where money is paid voluntarily with a full knowledge of all the facts, it cannot be recovered on the ground that the payment was made under a mistake of fact: *Pertab Singh v. The Secretary of State* (1876) Punj. Rec. no. 94.

(m) Pollock, *Law of Fraud in British India*, p. 128.

A. to B. upon a misconstruction of the terms of a lease cannot be recovered back (*n*). S. 72

A debtor may recover from a creditor the amount of an overpayment made to him if it was made by mistake (*o*). But where A. pays money to B. who, A. knows, is C.'s agent, under a mistake, A. is not entitled to recover the money from B., if before demand made upon B., B. has paid the amount to C., or, if he has not, has yet done some act to his own detriment as regards his principal (*p*). It has been so held by the High Court of Bombay, in accordance with English law (*q*).

Coercion.—It was laid down by the Judicial Committee in 1913 that the word "Coercion" in this section is used in its general and ordinary sense and its meaning is not controlled by the definition of "coercion" in s. 15. Accordingly where A. who had obtained a decree against B. obtained an attachment against C.'s property, and took possession of it to obtain satisfaction for the amount of the decree, and C. on being ousted from his property paid the sum claimed under protest, it was held that C. was entitled to recover the sum as money paid under "coercion" within the meaning of this section (*r*). It was formerly held in India that the word "coercion" in this section meant the same thing as "coercion" in s. 15, and therefore no act was "coercion" unless it was done "with the intention of causing any person to enter into an agreement" as required by the definition in that section; nevertheless, where the defendant had received money which in justice and equity belonged to the plaintiff under circumstances which rendered the payment involuntary, and the

(*n*) *Khazan Singh v. The Secretary of State* (1878) *Punj. Rec.* no. 33.

(*o*) *Badr-un-nisa v. Muhammad Jan* (1880) 2 *All.* 671, 674.

(*p*) *Solomon Jacob v. The National Bank of India* (1918) 42 *Bom.* 16, 32-35, 48.

(*q*) In an earlier Allahabad case, it was held that an agent for collection who had innocently presented to the treasury a forged draft and received payment of money was liable to repay the money though he had handed it over to his principal. The Court purported to follow *Tugman v. Hopkins* (1842)

4 *Man. & G.* 389, which was not a case of payment by mistake, but of an unlawful taking by the defendant of money found lying in a room, and expressly decided on the ground that he was a trespasser. The Allahabad decision, it is submitted, is wrong, and was rightly dissented from by the High Court of Bombay: *Shugan Chand v. The Government of North Western Provinces* (1875) 1 *All.* 79.

(*r*) *Seth Kanhaya Lal v. National Bank of India* (1913) 40 *L. A.* 56, 40 *Cal.* 598.

- B. 72. receipt by the defendant to the use of the plaintiff, the plaintiff could recover the money, but the case was not within the present section (s). This view is now superseded; as the action is maintainable under s. 72, it is immaterial whether the language used in the judgment by the Judicial Committee as to s. 72 being "exhaustive" (t) is right or wrong; but, if it were material, we should think it wrong. In *Fatima Khatoon v. Mahomed (u)*, the plaintiffs, who were Mahomedan ladies, were entitled to a charge on certain property in respect of their dower. The defendants, who were holders of a decree against the heirs and representatives of the person to whom the property belonged, obtained leave in execution proceedings to sell the property. In order to prevent that sale, which would have been injurious to them, the plaintiffs paid under protest the amount of the defendants' decree into Court. In a suit to recover back the amount it was held by the Judicial Committee that the payment was made "not voluntarily, but under a species of compulsion," and that they were, therefore, entitled to a decree. And in a subsequent case it was held by the same tribunal that a payment made by the purchaser of a property to prevent its sale in execution of a decree obtained by a mortgagee whose debt had been satisfied can be recovered back, as it was made "under force of these execution proceedings" (v). Similarly money paid as income-tax under threat of attachment may be recovered back under this section (w). And it is held that where a person who is charged with a non-compoundable offence is induced to pay money to the complainant to stifle the prosecution, he may recover the money so paid under this section (x); but not if no pressure or compulsion was exercised upon the accused (y).

(s) *Jugdeo Narain Singh v. Rajah Singh* (1888) 15 Cal. 656, at pp. 664-665 [payment made under the force of execution proceedings]; *Narayanasami v. Osura Reddi* (1901) 25 Mad. 548 at p. 552 [payment made to prevent wrongful sale of plaintiff's holding]. See also *Collector of Cawnpore v. Kedari* (1881) 4 All. 19 at p. 20.

(t) L. R. 40 I. A. at p. 58.

(u) (1868) 12 M. I. A. 65; S. C., 10 W. R. P. C. 29.

(v) *Dulichand v. Ramkishan Singh* (1881) 7 Cal. 648; S. C. L. R. 8 Ind. Ap. 93.

(w) See *Forbes v. Secretary of State for India* (1915) 42 Cal. 151, at pp. 154-155.

(x) *Muthuramappa v. Ramaswami* (1917) 40 Mad. 285.

(y) *Amjadennessa Bibi v. Rahim Buksh* (1915) 42 Cal. 286; *Binde Shari Prasad v. Lekhray Saha* (1916) 1 Pat. L. J. 48, 60-61.

Wrongful payment.—There is a class of cases which, though not directly bearing on this section, may be conveniently dealt with in this place. They are cases where money is paid in execution of a decree, and it is sought to recover back the amount on the reversal of the decree. In such a case the payment, though in the first instance lawful, becomes wrongful on the reversal of the decree (z). The rule of law on this subject is that money paid under a decree cannot be recovered back in a fresh suit whilst the decree remains in force. But if the decree is reversed or superseded the amount paid under it is recoverable. And it has been held in effect by the Judicial Committee that a decree will be deemed to be superseded, though not actually reversed, if it was made pending an appeal to a higher Court from an antecedent decree on the same cause of action, and the latter decree is reversed by the appellate Court, and the order of reversal was intended to deal with all the rights and liabilities of the parties under it (a), the principle being that where the main decree which is the basis of subsequent decrees is reversed the latter decrees, being subordinate and dependent decrees, are superseded (b). See Code of Civil Procedure, 1908, s. 140.

Compare s. 86 of the Indian Trusts Act, 1882, which provides that where property is transferred in pursuance of a contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid.

(z) *Per Cur. Jogesh Chunder Dutt v. Kali Churn Dutt* (1877) 3 Cal. 30 38.

(a) *Shama Purshad Roy v. Hurro Purshad Roy* (1865) 10 M. I. A. 203, followed by a majority of the Full Bench in *Jogesh Chunder Dutt v. Kali Churn Dutt* (1877) 3 Cal. 30. In the former of these cases there were several decrees for interest on a bond, in the latter for enhanced rent. The reversal of one of those decrees by the Privy Council was

held to have superseded all other decrees obtained during the pendency of the appeal to the Queen in Council, so as to give a right for the recovery of the amount paid under them.

(b) (1877) 3 Cal. 30, 37, 38. See *Kishen Sahai v. Bakhtawar Singh* (1898) 20 All. 237, where it was held that there was no such supersession of the decrees as in the Privy Council cases cited above.

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CHAPTER VI.

OF THE CONSEQUENCES OF BREACH OF CONTRACT.

73.—When a contract has been broken (c), the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations.

(a) A. contracts to sell and deliver 50 maunds of saltpetre to B. at a certain price, to be paid on delivery. A. breaks his promise. B. is entitled to receive from A. by way of compensation, the sum, if any, by which the contract price falls short of the price for which B. might have obtained 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered.

(c) This section is declaratory of L. A. C. 175, 43 Ind. App. 6, 11; 43 the Common Law as to damages: *Jamal* Cal. 493, 503.
v. *Moola Dawood Sons & Co.* [1916]

[**Note.—Market rate.**—Under a contract for the sale of goods S. 78. the measure of damages upon a breach by the buyer is the difference between the contract price and the market price *at the date of the breach*. If the seller retains the goods after the breach, he cannot recover from the buyer any further loss if the market falls, nor is he liable to have the damages reduced if the market rises (*d*).

Generally it is "quite settled that on a contract to supply goods (*e*) of a particular sort, which at the time of the breach can be obtained in the market, the measure of the damages is the difference between the contract price and the market price at the time of the breach." But the subject-matter of the contract may not be marketable. In that case the value must be taken as fixed by the price which actually has to be paid for the best and nearest available substitute: *Hinde v. Liddell* (1875) L. R. 10 Q. B. 265, 269; *Elbinger Actien-Gesellschaft v. Armstrong* (1874) L. R. 9 Q. B. 473, 476. Where no such substitute is available, then if there has been a contract to resell them the price at which the contract was made will be evidence of their value; but if there has been no such contract, the market value may be estimated by adding to their price at the place where they were purchased the costs and charges of getting them to their place of destination, and the usual importer's profits: *Borries v. Hutchinson* (1865) 18 C. B. N. S. 445; 44 R. R. 563; *O'Hanlan v. G. W. Ry. Co.* (1865) 6 B. & S. 484; *Cooverjee Bhoja v. Rajendra Nath* (1909) 36 Cal. 617; *Hajee Ismail & Sons v. Wilson & Co.* (1918) 41 Mad. 709, 715. See Mayne on Damages, 8th ed., p. 21 (*f*).

Again, if the buyer, after giving the seller time at his request, finally has to go into the market and buy at an advanced price, he may recover the whole difference between the contract price and the price he actually paid: *Ogle v. Earl Vane*, Ex. Ch. (1868) L. R. 3 Q. B. 272. "The defendant, in effect, sought forbearance, and must pay for it": Willes, J., at p. 280. But where no such request has

(*d*) *Jamal v. Moola Dawood Sons & Co.* [1916] 1 A. C. 175, 43 Ind. App. 6, 43 Cal. 493.

(*e*) Including shares in a Company, see *Williams Bros. v. Ed. T. Agins* [1914] A. C. 510.

(*f*) As to the case of a buyer fail-

ing to accept goods made to his order and of such a kind that they have no market price, *Re Vic Mill* [1913] 1 Ch. 183; in C. A. [1913] 1 Ch. 465, where the question was treated as being wholly on the facts.

- S. 73. proceeded from the seller, the buyer is not entitled to anything more than the difference between the contract rate and the market rate *at the date of the breach*, though he may not have pressed for delivery on the due date : *Muthayamanigaran v. Lakku Reddian* (1912) 22 Mad. L. J. 413.

The fact that the buyer sustains no actual loss from the seller's failure to deliver the goods is no ground for awarding merely nominal damages to the buyer. The buyer is entitled, as indicated by ill. (a) to the section, to receive from the seller by way of compensation the sum by which the contract price falls short of the price for which the buyer *might* have obtained goods of like quality at the time when they ought to have been delivered (g).

" Obviously value created for special purpose is irrelevant, and it is for this reason that the prices made by bulls and bears are of no use to us. If the market value is uncertain, then we must have recourse to such surrounding circumstances as affect the probabilities, and among them to real prices proved about the time of due date. Now market price is to a great extent based on, and made up of the views of, those engaged in a particular business and familiar with its incidents. These views are based not only on transactions in which a man may himself have been actually engaged, but also on the general rumour and reputation in the market. Therefore, a man may be a competent witness for the purpose of testifying to market value, though he may not himself have been engaged in or carried through any dealing in the market at the particular date in question. We cannot then exclude from consideration any evidence on this point, merely because the deponent may not himself have bought or sold on the due date." (h)

Market rate: limits of rule.—The market rate, however, is only a presumptive test : "it is the general intention of the law that, in giving damages for breach of contract, the party complaining should, so far as it can be done by money, be placed in the same position as he would have been in if the contract had been performed," and the rule as to market price "is intended to secure only an indemnity" to

(g) *Hajee Ismail & Sons v. Wilson Gokuldas* (1902) 26 Bom. 235, at p. 239, & Cal. (1918) 41 Mad. 709. In the first sentence "purpose" appears

(h) *Shridhan Gopinath v. Gordhandas* to be a misprint for "purposes."

the purchaser. "The market value is taken because it is presumed to be the true value of the goods to the purchaser." If he does not get his goods he "should receive by way of damages enough to enable him to buy similar goods in the open market. Similarly, when the delivery of goods purchased is delayed, the goods are presumed to have been at the time they should have been delivered worth to the purchaser what he could then sell them for, or buy others like them for, in the open market, and when they are in fact delivered they are similarly presumed to be, for the same reason, worth to the purchaser what he could then sell for in that market." There is an important exception "if in fact the purchaser, when he obtains possession of the goods, sells them at a price greatly in advance of the then market value." In such a case he must allow for the profit he actually makes and can recover only his actual loss; otherwise he would be placed in a better position than if the contract had been performed. So the law is explained by the Judicial Committee in *Wertheim v. Chicoutimi Pulp Co.* [1911] A. C. 301, 307, 308 (i). Cp. the *British Westinghouse, etc.. Co.'s* case, p. 412, below.

A. agrees to purchase B.'s house at Rs. 5,500. A. afterwards refuses to complete the purchase. The house is then sold by auction in execution of a decree against B., and realises Rs. 3,100 net. B. is entitled to receive from A. by way of compensation Rs. 2,400: *Mohunlal Tribhuvandas v. Chunilal Harinarayan* (1902) 4 Bom. L. R. 814; *Nabinchandra v. Krishna* (1911) 38 Cal. 458.

Where the defendant contracted to deliver to the plaintiff at Bombay 1,000 tons of a certain species of coal from February to June, and failed to deliver any of the coal, and no purchase was made by the plaintiff against the defendant's contract, and there was practically no coal in Bombay of the description contracted for at the dates at which delivery should have been given, the Court received in evidence a statement produced by the plaintiff showing the rates at which he had during the contract period settled certain contracts for the same coal with other persons, to ascertain the actual value of the coal on the dates of the breach: *Jaghomundas v. Nusserwanji* (1902) 26 Bom. 744.]

(i) Note that this "was a case, not of delivery withheld, but of delivery delayed": per Lord Dunedin, [1914] A. C. at p. 522. As to what are called accidental circumstances as between seller and buyer, see pp. 413 below.

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(b) A. hires B.'s ship to go to Bombay, and there take on board, on the first of January, a cargo which A. is to provide, and to bring it to Calcutta, the freight to be paid when earned. B.'s ship does not go to Bombay, but A. has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A. avails himself of those opportunities, but is put to trouble and expense in doing so. A. is entitled to receive compensation from B. in respect of such trouble and expense.

[Note.—A. contracts with B. to provide a ship on a certain day to receive a cargo of coal to be carried to Havre. A. fails to provide the ship in time, and B. has to charter vessels at an advanced freight and also buy coal at a higher price. B. can recover from A. the increase of price as well as the increase of freight, unless A. can show that, by reason of a corresponding increase in the market price at the port of delivery or otherwise, the loss is compensated wholly or in part : *Featherston v. Wilkinson* (1873) L. R. 8 Ex. 122. A. contracts with B. to sell and deliver goods which on the day appointed for delivery are worth Rs. 80 per ton. They are delivered later on a day when they are worth only Rs. 50 per ton, but meanwhile A. has sold them for Rs. 70 per ton. A. is entitled to damages only for his actual loss of Rs. 10 per ton : *Wertheim v. Chicoutini Pulp Co.* [1911] A. C. 301 (see above).]

(c) A. contracts to buy of B., at a stated price, 50 maunds of rice, no time being fixed for delivery. A. afterwards informs B. that he will not accept the rice if tendered to him. B. is entitled to receive from A., by way of compensation, the amount, if any, by which the contract price exceeds that which B. can obtain for the rice at the time when A. informs B. that he will not accept it.

[Note.—Where no time fixed for delivery.—If in the case put above A. gave notice to B. that he would not take delivery beyond a certain date, and delivery is not made within that time, the measure of damages would be the difference between the contract price and the market price on that date : *Gauri Datt v. Nanik Ram* (1916) 14 All. L. J. 597.]

(d) A. contracts to buy B.'s ships for 60,000 rupees, but breaks his promise. A. must pay to B., by way of compensation, the excess, if any, of the contract price over the price which B. can obtain for the ship at the time of the breach of promise.

(e) A., the owner of a boat, contracts with B. to take a cargo of jute to Mirzapur for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Mirzapur is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B. by A. is the difference between the price which B. could have obtained for the cargo at Mirzapur at the time when it would have arrived if forwarded in due course and its market price at the time when it actually arrived.

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[Note.—Late delivery.—There is not any general rule that damages cannot be recovered for loss of market on a voyage by sea : “wherever the circumstances admit of calculations as to the time of arrival and the probable fluctuations of the market being made with the same degree of reasonable certainty in the case of a sea as of a land transit, there can be no reason why damages for late delivery should not be calculated according to the same principles in both cases” : *Dunn Bucknall Bros.* [1902] 2 K. B. 614, 622, C. A. *per Cur.*, holding that the earlier decision of the C. A. in *The Parana* (1877) 2 P. Div. 118, had not laid down anything to the contrary. It must depend on the circumstances, including the character of the navigation undertaken, what amount of reasonable anticipation can be held practicable. Modern commerce tends to become more certain by sea no less than by land, and perhaps in a more marked degree.]

(f) A. contracts to repair B.'s house in a certain manner, and receives payment in advance. A. repairs the house, but not according to contract. B. is entitled to recover from A. the cost of making the repairs conform to the contract.

(g) A. contracts to let his ship to B. for a year, from the first of January, for a certain price. Freight rises, and on the first of January the hire obtainable for the ship is higher than the contract price. A. breaks his promise. He must pay to B., by way of compensation, a sum equal to the difference between the contract price and the price for which B. could hire a similar ship for a year on and from the first of January.

(h) A. contracts to supply B. with a certain quantity of iron at a fixed price, being a higher price than that for which A. could procure and deliver the iron. B. wrongfully refuses to receive the iron. B. must pay to A., by way of compensation, the difference between the contract price of the iron and the sum for which A. could have obtained and delivered it.

[Note.—Delivery by instalments.—Anticipatory breach.—If the iron was to be delivered by instalments at certain dates, e.g., at the end of the three months of September, October, and November, the measure

- §. 73. of damages is the sum of the differences between the contract and the market price of the several instalments on the respective final days for performance : *Brown v. Muller* (1872) L. R. 7 Ex. 319 ; and the same rule is applied where the seller, before the expiration of the whole time for performance, has refused to complete the contract, and the buyer has treated the refusal as an immediate breach (see pp. 284, 285, above), unless the seller can show that the buyer could have obtained a new contract on better terms : *Roper v. Johnson* (1873) L. R. 8 C. P. 167 ; *Krishna Jute Mills Co. v. Innes* (1911) 21 Mad. L. J. 182 ; *cp. s. 120*, p. 560, below.

If a vendor has a specified time allowed to him to deliver goods (the option was to deliver in August or September), and before the expiry of that time he gives notice to the purchaser that he will be unable to perform the contract, and the purchaser does not rescind the contract (as he may do under s. 39), the measure of damages is the difference between the contract price and the market price on the last day of the period limited (*i.e.*, in this case the last day of September) : *Mackertich v. Nobo Coomar Roy* (1903) 30 Cal. 477, following *Leigh v. Paterson* (1818) 8 Taunt. 540, 20 R. R. 552. If the contract is for delivery in August and September, the damages are distributable according to *Brown v. Muller* : *Cooverjee Bhoja v. Rajendra Nath* (1909) 36 Cal. 617. If the contract is for sale of a certain quantity of goods, and it is stipulated "shipments to be made by steamers during July to December, . . . the agreement to be construed as a separate contract in respect of each shipment," the instalments must be deemed to have been intended to be distributed rateably over the months from July to December, and the damages are distributable according to *Brown v. Muller* : *Bilasiram v. Gubbay* (1916) 43 Cal. 305.

A., a stock broker, closes the account of a client, B., prematurely and without instructions, instead of carrying it over to the next settlement, as on the facts and the true construction of their agreement he ought to have done. B. informs A. that he insists on the performance of the contract. A. cannot claim to have the damages assessed with reference to the price of stocks at the date of closing the account, but B. is entitled to claim damages assessed according to the prices at

the date fixed for performance; *quare* whether according to the highest price reached in the interval : *Michael v. Hart & Co.* [1902] 1 K. B. 482 C. A.] S. 78.

With regard to several deliveries under one contract, where the defendant agreed with the plaintiff to purchase from him gunny bags, of which delivery was to be given at certain stated times, and the defendant failed to take delivery, it was held that the proper measure of damages was the difference between the contract price and the market price at the dates of failure by the defendant to take delivery : *Cohen v. Cassin Nana* (1876) 1 Cal. 264.

(i) A. delivers to B., a common carrier, a machine to be conveyed without delay, to A.'s mill, informing B. that this mill is stopped for want of the machine. B. unreasonably delays the delivery of the machine, and A., in consequence, loses a profitable contract with the Government. A. is entitled to receive from B., by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

[Note.—Notice of special circumstances.—The facts in *Hudley v. Bazendale*, 9 Ex. 341, 96 R. R. 742, were somewhat like these, except that the defendants did not know that the plaintiffs' mill was stopped for want of part of the machinery which they were to supply. They were held not liable for loss of profit. It may be collected from the judgment that with knowledge they would have been liable. As to the general rule there laid down see the commentary below. The loss of profits on a contract of which the defendant had not notice is clearly too remote. But where the defendant failed to supply an essential part of a machine which the plaintiff, to his knowledge, was under contract to supply to a third person, and the plaintiff, by the defendant's default, lost the benefit of that contract, the defendant was held liable both for the loss of profit and for the plaintiff's charges in making other parts of the machine : *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q. B. Div. 670.

B. delivers to A. several cases of machinery to be carried by sea from Bombay to Karachi for the purpose of building a mill. On arrival at Karachi one of the cases, containing indispensable parts of the machinery, is not to be found. A. knew that the cases contained

8. 73 machinery, but did not know the specific contents of each case. A. is liable to pay B. by way of compensation the value of the lost case, freight, and interest, but not the profits lost by the mill not having been set up at the time intended. (See *British Columbia Sawmill Co. v. Nettleship* (1868) L. R. 3 C. P. 499.)

A., who makes a business of collecting and forwarding telegrams, contracts with B. to forward a ciphered cable message from Calcutta to X., who is B.'s correspondent in London. The message conveys no meaning on the face of it. A. negligently fails to forward the message in due time, and B. loses the profits which he would have made if X. had duly received and acted upon it. A. is not liable to B. for these profits, as he had no means of knowing what would be the consequences of a breach of his contract : *Saunders v. Stuart* (1876) 1 C. P. D. 326.]

(j) A., having contracted with B. to supply B. with 1,000 tons of iron at 100 rupees a ton, to be delivered at a stated time, contracts with C. for the purchase of 1,000 tons of iron at 80 rupees a ton, telling C. that he does so for the purpose of performing his contract with B. C. fails to perform his contract with A., who cannot procure other iron, and B., in consequence, rescinds the contract. C. must pay to A. 20,000 rupees, being the profit which A. would have made by the performance of his contract with B.

[Note.—Notice of contract of resale.—If C. only knew generally that A. wanted the iron for resale he would not be entitled to damages beyond the difference between the contract price and the market price at the date of the breach : *Thol v. Henderson* (1881) 8 Q. B. D. 457.]

B., having contracted with a shipowner, X., to supply coal to his steamers, enters into a contract with A., a colliery owner, for coal. The coal is expressly stated to be for shipment in X.'s steamers. A. fails to deliver coal to B. in time, and a ship of X.'s is delayed in consequence. X. sues B. and claims large damages ; B. defends the action and reduces the damages to a much smaller amount. A. is liable to B. for the costs reasonably incurred by B. in defending this action, as well as for the damages and taxed costs therein : *Agius v. G. W. Colliery Co.* [1899] 1 Q. B. 413, C. A. ; *Hammond & Co. v. Bussey* (1887) 20 Q. B. Div. 79 (j).]

(k) A. contracts with B. to make and deliver to B., by a fixed day, for a specified price, a certain piece of machinery. A. does not deliver the piece of machinery at the time specified, and, in consequence of this, B. is obliged to

(j) The judgments in these cases overrule or supersede some earlier decisions.

procure another at a higher price than that which he was to have paid to A., and is prevented from performing a contract which B. had made with a third person at the time of his contract with A. (but which had not been communicated to A.), and is compelled to make compensation for breach of that contract A. must pay to B., by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B. for another, but not the sum paid by B. to the third person by way of compensation.

(l) A., a builder, contracts to erect and finish a house by the first of January in order that B. may give possession of it at that time to C., to whom B. has contracted to let it. A. is informed of the contract between B. and C. A. builds the house so badly that, before the first of January, it falls down, and has to be rebuilt by B., who, in consequence, loses the rent which he was to have received from C., and is obliged to make compensation to C. for the breach of his contract. A. must make compensation to B. for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

[Note.—Notice of special circumstances.—In *Jagues v. Millar* (1877) 6 Ch. D. 153, it was held that where an intending lessor knew that the lessee wanted the premises for a certain trade, and refused to deliver possession for several weeks after the lessee was entitled to it, the lessee could recover for the estimated value to him of the possession during that time. There was another point on the question whether, under the Statute of Frauds, there was any enforceable agreement at all; on that point the case is overruled: *Marshall v. Berridge* (1881) 19 Ch. Div. 233.]

(m) A. sells certain merchandise to B., warranting it to be of a particular quality, and B., in reliance upon this warranty, sells it to C., with a similar warranty. The goods prove to be not according to the warranty, and B. becomes liable to pay C. a sum of money by way of compensation. B. is entitled to be reimbursed this sum by A. (k).

[Note.—Warranty.—A., a stevedore, agrees with B., a shipowner, to discharge the cargo of his ship, and B. agrees to supply all necessary and proper chains (among other gearing) reasonably fit for that purpose. A chain supplied by B. is defective and breaks in use, and Z., a workman of A.'s is thereby hurt. Z. sues A. under the English Employers' Liability Act, and A. settles the action by paying Z. a compensation which is admitted to be reasonable. B. is liable to

(k) If the goods, being food, are so bad that B., relying on the warranty without negligence incurs a fine under a Public Health Act, and loses trade

by reason of the conviction, B. can recover damages for the fine and costs and the loss of trade: *Cointat v. Myham & Son* [1913] 2 K. B. 220.

- S. 73. make good to A. the compensation which A. has paid to Z. as damages naturally resulting from B.'s breach of his warranty. A. was entitled as between himself and B., to rely on B.'s warranty, though such reliance was no excuse for A. as against Z. : *Mowbray v. Merryweather* (1895) 1 Q. B. 640, C. A.

A. sells a cow to B., whom he knows to be a farmer, and likely to put the cow in a herd, with a warranty that she is free from foot and mouth disease. The cow in fact has the disease and communicates it to other cows with which she is placed, and several of them die. B. can recover from A. the whole loss, and not only the value of the cow sold, and it is immaterial whether A. gave the warranty in good faith or not : *Smith v. Green* (1875) 1 C. P. D. 92.

A. agrees to recommend a broker to Z. and recommends Q., who is an undischarged bankrupt. A. does not know this, but could have ascertained it by reasonable inquiry. Z. on the strength of A.'s recommendation entrusts money for investment to Q., who misappropriates it. If A.'s agreement amounted to a contract, he has warranted the use of reasonable diligence in recommending a broker, and the measure of damages in an action by Z. against A. is the sum entrusted by Z. to Q. and misappropriated : *De la Bere v. Pearson, Ltd.* [1908] 1 K. B. 280, C. A. (l.) .

(n) A. contracts to pay a sum of money to B. on a day specified. A. does not pay the money on that day, B., in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined. A. is not liable to make good to B. anything except the principal sum he contracted to pay, together with interest up to the day of payment.

[Note.—Delay in payment of money.—Settled law, but treated as anomalous. “The law does not regard collateral or consequential damages arising from delay in the receipt of money” : *Per Cur., Graham v. Campbell* (1878) 7 Ch. Div. at p. 494. As to the liability to pay interest see p. 419, below. A. gives an *ijara patta* of certain property to B. It is a condition of the *patta* that B. should pay to the superior landlord the rent which A. was bound to pay to him. B. fails to pay the rent. The superior landlord thereupon sues A. for the rent, and, in execution of the decree obtained by him in the suit, the tenure is sold. B. is not liable to A. for the loss of the property, for A. could

(l) The doubt of one member of the Court was due to a minor complication in the facts which it is not thought useful to reproduce here.

have paid the rent on default by B., and saved the property from sale : *Girish Chandra v. Kunja Behari* (1908) 35 Cal. 683.] S. 73.

(o) A. contracts to deliver 50 maunds of saltpetre to B. on the first of January at a certain price. B. afterwards, before the first of January, contracts to sell the saltpetre to C. at a price higher than the market price of the first of January. A. breaks his promise. In estimating the compensation payable by A. to B., the market price of the first of January, and not the profit which would have arisen to B. from the sale to C., is to be taken into account.

[Note.—But a contract to resell at an advanced price is evidence, if not contradicted, of advance of market value : *Engell v. Fitch* (1869) L. R. 4 Q. B. 659, Ex. Ch. The sale was of real estate, and the vendors had failed, not to show title, but to obtain possession, which they might have done.]

(p) A. contracts to sell and deliver 500 bales of cotton to B. on a fixed day. A. knows nothing of B.'s mode of conducting his business. A. breaks his promise, and B., having no cotton, is obliged to close his mill. A. is not responsible to B. for the loss caused to B. by the closing of the mill.

(q) A. contracts to sell and deliver to B., on the first of January, certain cloth which B. intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B. is entitled to receive from A., by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.

[Note.—Loss of profits on breach of contract.—*Wilson v. Lanc. & Yorks. R. Co.*, 9 C. B. N. S. 632, 127 R. R. 814, followed by the Court of Appeal, *Schulze v. G. E. R. Co.* (1887) 19 Q. B. Div. 30, and approved by the Judicial Committee, *Wertheim v. Chicoutini Pulp Co.* [1911] A. C. 301, 308. The market price means here the price as diminished by the want of demand consequent on the season being past.

A tailor, expecting to make large profits on the occasion of a festival that is to be held at a certain place, delivers a sewing machine and a cloth bundle to a railway company to be conveyed to that place, and through the fault of the company's servants they are not delivered until after the conclusion of the festival. The company had not notice of the special purpose for which the goods were required. The tailor is not entitled to damages for the loss of profits nor for

- B. 78. his expenses incidental to the journey to that place and back, as such damages could not have been in the contemplation of the parties when they made the contract, nor can they be said to have naturally arisen in the usual course of things from the breach : *Madras Railway Co. v. Govinda Rau* (1898) 21 Mad. 172. If the company had known that the tailor wanted to use his goods for profit at the festival, it would be liable to him for the estimated loss of profit, and it would not be necessary for him to prove in detail what profit he expected to make : *Simpson v. L. & N. W. R. Co.* (1876) 1 Q. B. D. 274.]

(r) A., a shipowner, contracts with B. to convey him from Calcutta to Sydney in A.'s ship sailing on the first of January, and B. pays to A., by way of deposit, one-half of his passage money. The ship does not sail on the first of January, and B., after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and in consequence, arriving too late in Sydney, loses a sum of money. A. is liable to repay to B. his deposit with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which B. lost by arriving in Sydney too late.

Note.—No notice of special circumstances.—Here, and in several of the foregoing illustrations, it is assumed that A. has no defence to B.'s action on the contract ; and in this illustration it seems to be assumed that A. does not know B.'s particular reason for wanting to be at Sydney by a certain date. A. contracts to sell by description to B. sulphuric acid commercially free from arsenic. A. does not know what B. wants the acid for. B. receives sulphuric acid from A. under the contract, and uses it in producing a kind of sugar used by brewers. The acid is in fact not free from arsenic, the sugar manufactured with it is deleterious and useless, and B. incurs liability to his customers, and the goodwill of his business is diminished in value and other goods of B.'s are spoilt by being mixed with this acid. B. is entitled to recover from A. only the price of the acid and the value of the goods spoilt : *Bostock & Co. v. Nicholson & Sons* [1904] 1 K. B. 725.]

Remedy provided by this section not the only remedy for breach of contract.—Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuse,

to pay for the goods according to the terms of the contract, the seller may at his option either sue for the price of the goods or for damages for non-acceptance. The present section prescribes the method of assessing the damages, and it does not take away the right of a seller to maintain an action for the price where the property in the goods has passed to the buyer (*m*). See Sale of Goods Act, 1893, ss. 49 and 50. S. 78.

Rule in *Hadley v. Baxendale*.—The illustrations to this section were obviously considered of special importance. We have thought that several of the English and recent Indian decisions would be most usefully dealt with by stating them in the form of additional illustrations and inserting them, distinguished by inclusion within square brackets and by the reference to the report of each case, in the places which seemed most appropriate.

The text of the section is in substance identical with the draft of the Law Commissioners, and so are the illustrations as far as they go, though the number originally proposed was greater. The intention was plainly to affirm the rule of the Common Law as laid down by the Court of Exchequer in the leading case of *Hadley v. Baxendale*, now more than half a century ago. That rule, expressly and carefully framed (*n*) to be a guide to judges in directing juries, was as follows :

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be either such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the

(*m*) *P. R. & Co. v. Bhagwandas* (1909) *Radhakissen* (1909) 36 Cal. 736.

34 Bom. 192; *Finlay, Muir and Co. v.* (*n*) See 4 H. & C. 247, 143 R.R. 600.

S. 73. contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, for such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them" (o).

The Court which gave judgment in *Hadley v. Baxendale* was a very strong Court; and the rule laid down by it is in harmony with many other rules in our law which fix the measure of liability by the standard of what was known to the defendant, or ought to have been then and there known to a reasonable man in his circumstances. As formulated, the rule has two branches. First, the party breaking a contract is liable for damages arising "according to the usual course of things"; secondly, he is liable, or also liable for, "such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." But, as a recent writer has correctly pointed out, the first branch is in truth only a specification of the simpler cases under the second; for the natural and ordinary consequences of an event—namely, such as can be foreseen without any special information—are always assumed to be in the contemplation of reasonable men, and it is no excuse for a man to say that he failed to think reasonably or did not think at all (p). This view seems to be borne out by a remark of the late Lord Bowen when a member of the Court of appeal: "A person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract. That is the principle really at the bottom of *Hadley v. Baxendale*" (q).

Another late eminent Judge proposed a still further simplification. Why need we bring in the consideration of what the parties contemplate? "In my opinion," he said, "the parties never contemplate a breach, and the rule should rather be that the damage recoverable is

(o) *Hadley v. Baxendale* (1854) 9 Ex. 341, 354; 96 R. R. 742, 753 (where one passage is amended in accordance with the report in 23 L. J.), Finch Sel. Ca. 755, 762.

(p) See Mr. F. E. Smith (now Lord Birkenhead, L. C.) in L. Q. R. xvi. 275, 399.

(q) *Grebert-Borgnis v. Nugent* (1885) 15 Q. B. D.v. 85, 92.

such as is the natural and probable result of the breach of contract" S. 73. (r). But, with great respect, this would not really simplify the matter. For there is no universal definition of what is meant by "natural and probable"; and when we ask what is to be deemed natural and probable in a given case there seems to be no better way of fixing it than by reference to the judgment of a reasonable man having the means of information then and there available. In other words, those consequences are natural and probable in a legal sense which the parties in fact contemplate, or would as reasonable men contemplate.

There was at one time considerable authority for saying that, as to damages which could not be foreseen without information of special circumstances, notice of any such circumstances at the time of entering into the contract would not suffice to make the defendant liable, but there must be in effect, if not in terms, an undertaking to answer for resulting special damage (s). But this view was afterwards distinctly rejected by the Court of Appeal in England. "It cannot be said that damages are granted because it is part of the contract that they shall be paid; it is the law which imposes or implies the term that upon breach of a contract damages must be paid" (t). Even without this authority the opinion in question could not be entertained in British India, being inconsistent with the plain terms of the section. Further discussion of it would therefore be useless here. See notes to illustrations (h) to (j) above.

So far as practicable, "a person with whom a contract has been broken has a right to fulfil that contract for himself as nearly as may be,

(r) Cotton, L. J., in *McMahon v. Field* (1881) 7 Q. B. Div. at p. 597.

(s) *Horne v. Midland R. Co.* (1873) L. R. 8 C. P. 131, Ex. Ch.; see especially the judgment of Blackburn, J. Willes, J., had more than once intimated a like opinion.

(t) *Hydraulic Engineering Co. v. McHaffie* (1878) 4 Q. B. Div. 670, 677, per Cotton, L.J. The party "does not enter into a kind of second contract to pay damages": Bramwell, L.J., at p. 674. "An agreement to pay damages does not form part of the contract:" Brett, L.J., at p. 676. This is confirmed by *Hammond & Co. v. Bussey*

(1887) 20 Q. B. Div. 79: see especially per Bowen, L.J., at p. 97; and the later case of *Aguis v. Great Western Colliery Co.* [1899] 1 Q. B. 413, assumes the opposite opinion to be untenable. The learned editor of *Mayne on Damages*, in which book the theory of an auxiliary contract to pay special damages appears to have been first propounded, does not seem to us to have given adequate weight to these decided and unanimous utterances; neither do the learned editors of *Smith's Leading Cases* (notes to *Vicars v. Wilcocks* in vol. ii.).

8. 73. but he must not do this unreasonably or oppressively as regards the other party, or extravagantly." It is even his duty to take all reasonable steps to mitigate the loss consequent on the breach; and then the effect in actual diminution of the loss he has suffered may be taken into account, and this apart from the question whether it was his duty to act (u). "The question must always be whether what was done was a reasonable thing to do, having regard to all the circumstances," and one test is "what a prudent person uninsured," i.e., not having a claim for compensation or indemnity on any one, "would do under the same circumstances" (v). It is not a reasonable thing, for example, to hire a special train to save an hour or so of time when there is no particular reason for being at one's destination at a certain hour; and expense so incurred cannot be recovered as damages (v). If a buyer disappointed of his goods can buy in the market at a sum equal to or less than the contract price, he has suffered no loss and can recover nothing (under English law merely nominal damages) (w).

Sometimes it has been said that liability for consequences does not extend so far in contract as in tort; but there is no real authority for any such rule (x).

In England the Sale of Goods Act, 1893, s. 50, provides as follows :—

"(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary courses of events, from the seller's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price

(u) *British Westinghouse, &c. Co. v. Erie County, Natural Gas, &c. Co.* v. *Underground Electric, &c. Co.* [1912] *Carroll* [1911] A. C. 105.
 A. C. 873, see per Lord Haldane at p. 689. (w) *Erie County, &c., Co.'s Case*, last note.
 (v) *Le Blanche v. L. & N.-W. R. Co.* (1876) 1 C. P. Div. 238, per James, L.J., at p. 309, and *Mellish, L.J.*, at p. 313; approved by Jud. Comm. in (z) *The "Notting Hill"* (1884) 9 P. Div. 105, 113.

of goods at the time or times when they ought to have been delivered (y), or, if no time was fixed, then at the time of the refusal to deliver." S. 72.

This section, though not of positive authority in British India, may be useful as a compendious and well-considered statement of the existing rule.

As to the difference between contract and market price, it may be regarded as an application of the principle last stated as to the disappointed party's right to fulfil the contract himself at the defaulting party's cost, so far as it can reasonably be done.

In the absence of any more specific rule applicable to the case, damages for the breach of a contract to perform any specified work are to be "assessed at the pecuniary amount of the difference between the state of the plaintiff upon the breach of the contract and what it would have been if the contract had been performed," not the sum which it would cost to perform the contract, though in particular cases the result of either mode of calculation may be the same (z).

Matters of external and collateral compensation, as by insurance (a), or by an access of profit to some only of plaintiffs suing jointly in another transaction which but for the breach of contract would not have taken place (b), or through a new contract with a third person (c) are not taken into account for the purpose of reducing damages. The explanation to the present section does not appear to contradict this rule. The article on Damages by Mr. Blake Odgers, K.C., in the Encyclopædia of the Laws of England, may be referred to as giving a

(y) In India also the date of breach is the material date: a seller who holds on after the buyer's default can recover no further loss, nor is he liable to allow for improvement due to later change in the market price: *Jamal v. Mooda Daewood Sons & Co.* [1916] 1 A. C. 175, 43 Ind. App. 6.

(z) *Wignell v. School for Indigent Blind* (1882) 8 Q. B. Div. 357, 364, following *Robinson v. Harman* (1848) 1 Ex. 855, Finch, Sel. Ca. 753, and *Lock v. Furze* (1866) L. R. 1 C. P. 441. But there is a special rule as to covenants to repair. See p. 418, below.

(a) *Bradburn v. G. W. R. Co.* (1874)

L. R. 10 Ex. 1.

(b) *Jebson v. E. & W. India Dock Co.* (1875) L. R. 10 C. P. 300.

(c) *Joyner v. Weeks* [1891] 2 Q. B. 31, C. A.; *Williams Bros. v. Ed. T. Azins* [1914] A. C. 510, where the House of Lords conclusively settled the rule. "It is immaterial what the buyer is intending to do with the purchased goods. He is entitled to recover the expense of putting himself into the position of having those goods, and this he can do by going into the market and purchasing them at the market price": Lord Moulton at pp. 530, 531.

- S. 73. learned and careful summary of the whole subject down to its date, 1907, 2nd ed. We may add that the English rules appear to have been adopted in jurisdictions under the British flag but under systems of law differing generally from the Common Law and from one another.

Explanation to s. 73: "means which existed," etc.—This explanation has caused considerable difficulty in practice; the words "means which existed of remedying the inconvenience" have seemed obscure. No similar words are known to occur in English authorities, but the framers of the Act appear to have had in view the class of cases where, as we have just seen (*d*), the damages recoverable for consequential expenses are limited by the test of what a prudent man might have reasonably done if the whole expense was to fall on himself. The words are also sufficient to cover the case of a party who omits to take natural and obvious means of diminishing the loss incurred by the other party's failure to perform his contract. It seems on principle that in such a case consequential damage which might have been avoided by the exercise of common intelligence and prudence is not recoverable: thus, if one has to replace goods that have not been delivered in time, and has recklessly or stupidly bought them at an excessive price, the seller in default remains chargeable only with the difference between the contract and the normal market price. The rule must, of course, be applied with discretion; a man who has already put himself in the wrong by breaking his contract has no right to impose new and extraordinary duties on the aggrieved party. That party can be expected only to use ordinary and reasonable diligence, much less can he be expected to warrant success where the result of diligent endeavour is in its nature doubtful.

In this connection may be noted the observations of the Judicial Committee in *Jamal v. Moolla Dawood & Sons* (*e*). "It is undoubted law that a plaintiff who sues for damages owes the duty of taking all reasonable steps to mitigate the loss consequent upon the breach and cannot claim as damages any sum which is due to his own neglect. But the loss to be ascertained is the loss *at the date of the breach*. If at that date the plaintiff could do something or did something which

(*d*) Pp. 410, 411, above.

Cal. 493, 502.

(*e*) (1916) L. R. 43 I. A. 6, 10; 43

mitigated the damage, the defendant is entitled to the benefit of it. S. 78. *Staniforth v. Lyall* (f) is an illustration of this. But the fact that by reason of the loss of the contract which this defendant has failed to perform the plaintiff obtains the benefit of another contract which is of value to him does not entitle the defendant to the benefit of the later contract." In *Jamal's case* the plaintiff sold certain shares to the defendant to be delivered on or before December 30, 1911. The shares were tendered on December 30, but the defendant declined to take delivery or pay for them. The difference between the contract price and the market price on December 30, that is, the date of the breach, amounted to Rs. 1,09,218. Between February 28, 1912, and August, 1912, the plaintiff sold the shares in a rising market, thus realizing more than if he had sold on December 30, 1911, namely a sum only of Rs. 79,862 less than the contract price. In March, 1912, the plaintiff sued the defendant on the contract, claiming Rs. 1,09,218. The defendant contended that he was entitled to the benefit of the prices actually obtained in mitigation of damages, and the plaintiff was only entitled to recover Rs. 79,862; this contention was successful in the Chief Court of Lower Burma. But on appeal the Judicial Committee held that the measure of damages was the difference between the contract price and the market price *at the date of the breach*. If the seller retains the shares after the breach, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer: the seller cannot recover from the buyer the loss below the market price at the date of the breach if the market falls, nor is he liable to the purchaser for the profit if the market rises" (g).

A. agrees to let his house to B. at a certain rent. B. refuses to take the house, and A. sues B. for damages. The Chief Court of the Punjab is reported to have held that the measure of damages is the loss of rent suffered by A. after deducting such sum as A. could recover from another person by way of rent by making reasonable efforts to secure another tenant (h). We do not think the Court can have intended to lay down this or any like general proposition; reasonable efforts to secure a tenant do not produce any rent

(f) (1830) 7 Bing. 160.

(h) *Lachmi Narain v. Vernon* (1906)

(g) 43 L. A., at p. 10, 43 Cal. at p. Punj. Rec. no. 137.

8. 78. until an actual tenant is found, and the interval may be considerable. The probability of such effort succeeding within a reasonable time must obviously depend on local and often on temporary circumstances.

Contracts relating to immovable property.—It is commonly said that where a person sustains loss by reason of a breach of contract he is *prima facie* entitled, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed (i), though, as we have seen, this form of statement is open to some misunderstanding (j). Now this rule does not apply in English law to contracts for the purchase of immovable property. It was finally settled by the decision of the House of Lords in *Bain v. Fothergill* (k) that a purchaser of real estate cannot recover damages for the loss of his bargain, but only his deposit and expenses; and that even if the vendor knew that he had no title, nor any means of acquiring it, the purchaser may have a further remedy by an action for deceit, but not on the contract. The reason for this exceptional rule is that the purchaser of real estate in England must expect some degree of uncertainty as to whether a good title can be effectively made by the vendor, whereas the vendor of a chattel must know, or at all events is taken to know, what his right to the chattel is (l).

The special rule does not, however, apply to the case of wilful default in giving possession (m), nor to an express covenant for quiet enjoyment in an executed conveyance (n), nor to an executory agreement to make a title by a party who appears on the face of the agreement not to have any title at its date (o), nor, it seems, to unreasonable omission to complete the title by taking some definite step in the

(i) *Robinson v. Harman* (1848) 1 Ex. 855. 1 Ch. at p. 195; *Jaques v. Millar* (1877) 6 Ch. D. 153; *Royal Bristol Permanent Building Society v. Bomash*

(j) P. 412, above.

(k) (1874) L. R. 7. H. L. 158.

(l) In the United States, where registry of title or of assurances, in some form, is universal, the reason is generally held not to exist, and the rule therefore not accepted: Sedgwick *Elements of Damages*, *ad fin.*

(m) *Engell v. Fitch*, Ex. Ch. (1869) L. R. 4 Q. B. 659 (as to the authority of this case see per Byrne, J. [1902]

(1887) 35 Ch. D. 390.

(n) *Lock v. Furze*, Ex. Ch. (1866) L. R. 1 C. P. 441.

(o) *Wall v. City of London R. P. Co.* (1874) L. R. 9 Q. B. 249. The Court thought the case so clear that they did not delay judgment to see the result of *Bain v. Fothergill* (above), then pending in the House of Lords; see L. R. 9 Q. B. at p. 252.

vendor's power, such as applying for the lessor's consent to an assignment (p), nor to damages caused not by defect of title or any real difficulty of conveyancing, but by the vendor's want of reasonable diligence in completing (q). S. 73.

The rule in *Bain v. Fothergill* was at one time assumed in the High Court of Bombay to be the law of British India. A purchaser claimed to recover damages for the loss of his bargain, and the Court disallowed his claim on the ground that the vendor had offered to do all that lay in her power to carry out her contract (r). No reference was made to the Contract Act, but the argument turned on the question whether the case came under the rule in *Bain v. Fothergill* or the exception in *Engell v. Fitch* (s). The assumption so made by counsel and the Court was, it is submitted, erroneous. S. 73 is general in its terms, and does not exclude the case of damages for breach of a contract to sell immovable property (t), and in fact the rule was not settled beyond question in England when the Act was passed. "The Legislature has not prescribed a different measure of damages in the case of contracts dealing with land from that laid down in the case of contracts relating to commodities" (u). Where, therefore, a purchaser of land claims damages for the loss of his bargain, the question to be decided is whether the damage alleged to have been caused to him "naturally arose in the usual course of things from such breach"; and in an ordinary case it would be difficult to hold otherwise.

Even apart from the Act, the English rule is treated in its own jurisdiction as anomalous, and justified only by the peculiar conditions of English titles and conveyancing. It would therefore seem very doubtful whether, on the general principle of "justice, equity, and good conscience," it was ever applicable in British India. The view

(p) *Day v. Singleton* [1899] 2 Ch. 320, C. A., where, however, on the view taken by the Court of the facts, the default was wilful. faith, to a vendor of a mortgaged house who professed not to know where the title-deeds were and made no inquiry of the mortgagee.

(q) *Jones v. Gardiner* [1902] 1 Ch. 191.

(s) P. 416, above.

(r) *Pitamber v. Cassibai* (1880) 11 Bom. 272. It is by no means clear that, on its own ground, the decision was correct. In England we should not ascribe much diligence, not to say good

(t) It is remarkable that none of the illustrations to the section relate to contracts for the sale of land.

(u) Per Farran, C.J., in *Nagardas v. Ahmedkhan* (1895) 21 Bom. 175, 185.

8. 73. propounded above was recently approved by the High Court of Bombay in *Ranchhod v. Manmohandas* (v). The case was, however, one of wilful default on the part of the vendor in completing the title, and it was held, following *Day v. Singleton* (w), that the purchaser was entitled to recover not only the deposit with interest and expenses, but the loss of his bargain. At the same time the Court expressed the opinion that the rule in *Bain v. Fothergill* (x) was not law in this country. "As section 73 imposes no exception on the ordinary law as to damages, whatever the subject-matter of the contract, it seems to me that in cases of breach of contract for sale of an immovable property through inability on the vendor's part to make a good title the damages must be assessed in the usual way, unless it can be shown that the parties to the contract expressly or impliedly contracted that this should not render the vendor liable to damages" (y). A similar view has been expressed by the High Court of Calcutta (z). So, in a recent case before the Full Bench of the Madras High Court (a), it was held that a manager of a joint Hindu family who has agreed to sell immovable property belonging to himself and the minor members of the family is personally liable under this section for damages for failure to perform the contract when it is found that it is not binding on the minors, there being no necessity for the sale. It was also held that this liability was not affected by the fact that there was no misrepresentation on the part of the manager as to the necessity for sale, nor by the fact that the purchaser knew that he was buying from a manager of a joint family which comprised minors and that the Court may refuse specific performance against the minors. Where a vendor of land guarantees his title to the purchaser, and the latter is evicted from his holding he is entitled to recover the value of the land at the date of eviction, and not merely the purchase-money paid for it (b).

Where a lessee's covenant to deliver up the premises in good repair is broken at the end of the term, the measure of damages

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| (v) (1907) 32 Bom. 165. | (z) <i>Nabinchandra v. Krishna</i> (1911) |
| (w) [1899] 2 Ch. 320, C. A. See note | 38 Cal. 458, at p. 465. |
| (p), p. 417 above. | (a) <i>Adikesavan Naidu v. Gurunatha</i> |
| (x) (1874) L. R. 7 H. L. 153. | (1918) 40 Mad. 338. |
| (y) Per Macleod, J., 32 Bom. 165, | (b) <i>Nagardas v. Ahmedkhan</i> (1895) |
| 171. | 21 Bom. 175. |

would on strict principle be the amount by which the value of the reversion is diminished; but the difficulty and inconvenience of this calculation have led to the adoption, as the practical measure in such cases, of the reasonable cost of putting the premises into the state of repair in which they ought to have been left (c). In the case of a breach during the term the measure is, according to the more general standard, the diminution in the value of the reversion; and where the covenant is in a sub-lease expressed to be such, the intermediate lessor's liability to the superior lessor on the covenants in the original lease will be taken into account for this purpose (d).

As to liability for loss of, or damage to, property delivered to common carriers, see Act III of 1865; and as to the liability of a railway company, see Act IX of 1890.

Interest by way of damages.—Act XXXII of 1839 provides for the payment of interest by way of damages in certain cases (e). Under that Act the Court may allow interest on debts or sums certain which are payable by an instrument in writing from the time when the amount becomes payable where a time is fixed for payment, or, where no time is fixed, from the date on which demand of payment is made in writing giving notice to the debtor that interest will be claimed. The question

(c) *Joyner v. Weeks* [1891] 2 Q. B. 31, C. A.

(d) *Conquest v. Ebbetts* [1896] A. C. 490.

(e) The Act consists of a single section which runs as follows:—

“Whereas it is expedient to extend to the territories under the government of the East India Company, as well within the jurisdiction of Her Majesty's Courts as elsewhere, the provisions of the statute 3rd and 4th William IV., chapter 42, section 28, and concerning the allowance of interest in certain cases.

“It is therefore hereby enacted that upon all debts or sums certain, payable at a certain time or otherwise, the Court before which such debts or sums may be recovered may, if it shall think fit, allow interest to the creditor at a rate

not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, provided that interest shall be payable in all cases in which it is now payable by law.”

It follows Lord Tenterden's Act, passed in England a few years earlier (3 & 4 Will. IV. c. 42, s. 28), as to which see *L. C. & D. R. Co. v. S. E. R. Co.* [1893] A. C. 429.

- S. 73. arose in a Madras case (f) whether interest could be recovered by way of damages under the present section (illustration (n)) where it was not recoverable under the Interest Act, and it was held that it could not be so recovered. The effect of the judgment in that case is that wherever interest could be claimed by way of damages—and illustration (n) is an instance of such a case—it should not be awarded, unless either the requirements of the Interest Act are complied with, or interest is recoverable at common law.

In an Allahabad case (g) decided a year earlier the plaintiff sued the defendant as lessee (*thekadar*) of a village for arrears of rent together with interest, and it was held that, though under the N.-W. P. Rent Act (h) the defendant was not liable to pay interest on the arrears he was chargeable with interest under s. 73 of the Contract Act. In the course of a very brief judgment the Court (i) said:—"Illustration (n), of s. 73 shows that where a person breaks his contract to pay another a sum of money on a day certain specified he is liable for the principal sum due, together with interest up to the day of payment." As to this decision it may be observed that no interest ought to have been allowed up to the date of the suit (j), as the provisions of the Rent Act which applied to the parties expressly exempted *thekadars* from liability for such interest. On the point now before us the decision is directly opposed to that of the Madras Court. No reference was made to the Interest Act, and it does not appear from the report that the case came within that Act.

The Madras decision has been followed by the Chief Court of the Punjab (k), but it has been dissented from by the High Court of Calcutta. According to the Calcutta Court, interest may be awarded as damages for wrongful detention of money under the present section, though there may be no agreement to pay interest and though the

(f) *Kamalammal v. Peeru Meera*
Levrai Rowthen (1897) 20 Mad. 481.

(g) *Ghansham Singh v. Daulat Singh*
(1896) 18 All. 240. See also *Ghansham*
Singh v. Daulat Singh (1896) All.W. N. 53^a

(h) Act XII, of 1881, s. 34, Explanation.

(i) Consisting of Edge, C.J., and
Aikman, J.

(j) As to interest after suit, see s. 34
of the Code of Civil Procedure, 1908.

(k) *Bura v. Mailia Shah* (1901) Punj
Rec. no. 104; *Arjan Das v. Hakim Rai*
(1913) Punj. Rec. no. 39, p. 154.

case may not be covered by the Interest Act (l). This goes, indeed, beyond the English common law. S. 73 is merely declaratory of the common law as to damages (m), and no interest is allowed at common law by way of damages for mere wrongful detention of money. S. 73¹

The rule of English Common Law, and therefore presumably of British India apart from the Interest Act, is "that interest is not due on money secured" even "by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments" (n). "At common law interest was not payable on ordinary debts, unless by agreement or by mercantile usage; nor could damages be given for non-payment of such debts" (o). There does not seem to be any sufficient ground for reading into illustration (n) to the present section an intention to abolish this rule and supersede the Act of 1839. Indeed, the illustration does not say that the defendant is necessarily liable to pay interest, but only assumes that he may be so under the Act of 1839 or otherwise, and says that he is not in any event liable for more.

Breach of promise of marriage.—The principle on which damages are allowed by the English law as peculiar to the breach of a contract to marry are not applicable to the case of the breach of a promise made by the father of a Mahomedan girl to give her in marriage. All that the plaintiff is entitled to as against the father is the return of ornaments, clothes and other presents made by the plaintiff to the girl. The right to recover these is recognized by the Mahomedan law. Apart from that law the presents may be recovered either under s. 65 or this section (p).

(l) *Khetra Mohan v. Nishi Kumar* (1917) 22 Cal. W. N. 488, *Mahamaya Prasad v. Ram Khelawan* (1911) 15 Cal. L. J. 684, 687. In *Surja Narain v. Pratab Narain* (1899) 26 Cal. 955, 964-965, Banerjee, J., was inclined to the view that interest cannot be claimed by way of damages under s. 73 in every case of detention of money, but only when actual loss was proved, as where the creditor has to borrow money at interest from others on default in payment by the debtor.

(m) *Jamal v. Moolla Daood Sons & Co.* (1916) L. R. I. A. 6, 11, 43 Cal. 493, 503.

(n) *Page v. Newman* (1829) 9 B. & C. 378, 381; 33 R. R. 204, 206; and see the English authorities reviewed by Lord Herschell, *L. C. & D. R. Co. v. S. E. R. Co.* [1893] A. C. 429, 437 sqq.

(o) Lindley, L.J., *S. C.* in *C. A.* [1892] 1 Ch. at p. 140.

(p) *Abdul Razak v. Mahomed Hussen* (1918) 42 Bom. 499.

§. 73, 74. The section applies only where a contract has been broken.—This would seem to need no proof or even statement, yet judicial affirmation of it has been necessary. A toll contractor who suffers loss in his income by reason of the discontinuance of the traffic, owing to plague regulations made by Government consequent upon the outbreak of plague in the locality, has no cause of action against the Government to recover damages as on a breach of contract (q). There is no breach of contract involved in making the regulations; and one may add that such an action would not have been possible in any Western country. We fail to see how the pleader can have seriously thought he could make out a contract either actual or constructive between the plaintiff and the Government.

74.—When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation.—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception.—When any person enters into any bail-bond, recognisance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Government of India or of any local Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation.—A person who enters into a contract with Government does not necessarily thereby undertake any

(q) *Secretary of State for India v. Abdul Rahim* (1902) 4 Bom. L. R. 374.

public duty, or promise to do an act in which the public are interested. §. 74

Illustrations.

(a) A. contracts with B. to pay B. Rs. 1,000 if he fails to pay B. Rs. 500 on a given day. A. fails to pay B. Rs. 500 on that day. B. is entitled to recover from A. such compensation, not exceeding Rs. 1,000, as the Court considers reasonable.

(b) A. contracts with B. that, if A. practises as a surgeon within Calcutta, he will pay B. Rs. 5,000. A. practises as a surgeon in Calcutta. B. is entitled to such compensation, not exceeding Rs. 5,000, as the Court considers reasonable.

(c) A. gives a recognisance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognisance. He is liable to pay the whole penalty.

(d) A. gives B. a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B. is only entitled to recover from A. such compensation as the Court considers reasonable.

(e) A., who owes money to B., a money-lender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty and B. is only entitled to reasonable compensation in case of breach.

(f) A. undertakes to repay B. a loan of Rs. 1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A. borrows Rs. 100 from B., and gives him a bond for Rs. 200, payable by five-yearly instalments of Rs. 40, with a stipulation that in default of payment by any instalment, the whole shall become due. This is a stipulation by way of penalty.

Penalty and liquidated damages.—This section boldly cuts the most troublesome knot in the Common Law doctrine of damages. By the Common Law parties may name a penal sum as due and payable on a breach of contract, that sum being, according to the true intention of the parties, only a maximum of damages. In that case the real damages, and no more, are recoverable. On the other hand, they may by consent assess a fixed measure of damages, liquidated damages as they are called, to avoid the difficulty that

§. 74. must often be found in setting a pecuniary value on obligations not referable, on the face of them, to any commercial standard. So far this looks very well. The trouble is that even now the Courts have not arrived at clear or certain rules for deciding to which of these two classes a given stipulation for a penal or seemingly penal sum belongs. The only thing that is quite certain is that the use of the words "penalty" or "liquidated damages" is not decisive; and that even the addition of negative words purporting to exclude the other alternative, for example "as liquidated damages and not as a penalty" (r), will not make it so. Two causes appear to have conspired to produce this anomalous result: a well-meant but perhaps not wholly well-informed endeavour to imitate the equitable doctrine of giving relief against forfeiture (s), and, reinforcing this, a logical or arithmetical repugnance of the Common Law (perhaps connected with the canonical prohibition of usury) (t) to admit that a greater sum of money can ever be due for the breach of an obligation to pay a smaller one. "That a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms" (u). Accordingly a conventional larger sum agreed upon as payable in the event of failure to pay a smaller sum, or in such an event among others, is treated as penal only. Further, it is understood that "where a sum is made payable by a contract to secure performance of several stipulations the damages for the breach of which respectively must be substantially different. . . . that sum is *prima facie* to be regarded as a penalty, and not as liquidated damages" (v). The truth is that here, as in some other branches of the law, what once was a rule of policy overriding the intention of the parties has been turned into an artificial and more or less arbitrary rule of construction. The nearest approximation to a general test yet arrived at is that so-called liquidated damages will not be recoverable in full when the

(r) In *Kemble v. Farren* (1829) 6 Bing. 141, 31 R. R. 366, a sum expressly declared by the parties to be "liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof" was held to be a penalty.

(s) See per Jessel, M.R., *Wallis v. Smith* (1882) 21 Ch. Div. 243, 258.

(t) It must be remembered that in the Middle Ages, and even later, usury meant not taking exorbitant interest, but taking interest at all.

(u) *Kemble v. Farren*, 6 Bing. at p. 143.

(v) A. L. Smith, L.J., *Wilson v. Love* [1896] 1 Q. B. 626, 631.

Court thinks this would be extravagant or unconscionable having regard to the circumstances of the particular case (*w*). But it is quite needless to enter in this place upon the somewhat confusing application of the resulting distinctions, for the manifest purpose of the present section is to get rid of all these questions by carrying out the tendency of the English authorities to its full consequences.

There may, again, be a conventional sum which is neither damages nor penalty, but, as it has been called, a "liquidated satisfaction" (*x*), the agreed price of liberty to do or omit something. In such a case there is merely a conditional or alternative promise which, if not open to any other objection, will take effect according to its terms.

Amendment.—There is no doubt that, as the section originally stood, it was intended to do away with the distinction between a penalty and liquidated damages (*y*). "The sole object of the section appears to have been to provide for the class of cases to which *Kemble v. Farren* (*z*) belongs, and in which the distinction between 'liquidated damages' and 'penalty' has given rise to so much difference of opinion in the English Courts" (*a*). The first paragraph and the explanation following it were substituted for the paragraph as originally enacted by the Indian Contract Act Amendment Act VI of 1899, s. 4. The italicised words indicate the portion newly added in the section. Illustrations (d), (e), (f), and (g) were also inserted by the same Act. The marginal note to the section has also been altered; it originally stood thus: "Title to compensation for breach of contract in which a sum is named as payable in case of breach."

The first section of the Amendment Act provides that it shall come into force on the first day of May, 1899, and that it shall apply to

(*w*) *Clydebank Engineering Co. v. Putter v. Chait Achen* (1881) 3 Mad. 224, 228; *The Brahmaputra Tea Co., Ltd. v. Searth* (1885) 11 Cal. 545, 550; *Deno Nath v. Nibaran Chandra* (1899) 27 Cal. 421, 423; *Nait Ram v. Shih Dat* (1882) 5 All. 238, 241; *Dilbar Sarkar v. Joyeri Kurmi* (1898) 3 C. W. N. 43, 45.

(*z*) See *Lord Elphinstone v. Monk- and Iron and Coal Co.* (1886) 11 App. 347.

(*y*) *Mackintosh v. Crow* (1883) 9 Cal. 89, 602, per Wilson, J.; *Vengidenwara v. Salekhan* (1892) 17 Bom. 106, 111.

(*a*) 6 Bing. 141.

- S. 74. "every contract in respect of which any suit is instituted or which is put in issue in any suit after the aforesaid date." These words have already given rise to conflicting opinions. The Madras High Court has expressed an opinion that the words "contract in respect of which any suit is instituted" apply to cases where a suit is brought to enforce a contract, or to have a contract set aside, and that the words "contract which is put in issue" apply to cases where it becomes necessary for the Court to adjudicate upon a contract, although the suit was not brought either to enforce it or to have it set aside. It is quite clear that where a suit is brought "in respect of" a contract the revised section will not apply to the contract unless the suit is "instituted" after the commencement of the Amendment Act. It is, however, not so clear whether the words "put in issue" in any suit mean put in issue in any suit *instituted* after the commencement of the Act. The Madras High Court would read the word "instituted" after the words "put in issue in any suit." The result, therefore, is that, according to that Court, the revised section would not apply to a contract "put in issue" in any suit unless the suit is *instituted* after the commencement of the Act (b). It was said by the Court that "to construe it otherwise would lead to serious inconveniences and anomalies, and that, having regard to the general scope of the amendments made by the Act and the canons of construction in cases where vested rights are affected or the legal character of past transactions is concerned, the Act should be construed as applying only to suits instituted after the commencement of the Act." On the other hand, it has been held by the High Court of Allahabad, without reference to the Madras case or to the possible difference of opinion on the point, that it is enough for the application of the revised section that the contract is "put in issue," after the commencement of the Act, though the suit in which it is put in issue may have been instituted before that date. Where a suit was, therefore, brought by a creditor *before* the commencement of the Act to recover the principal and interest due on a bond, and the defendants filed their written statement *after* the commencement of the Act, objecting *inter alia* to the enhanced rate of interest charged in the bond, it was held that the contract was,

(b) *Sankara v. Sankara* (1901) 25 Mad. 343, 348; *Chinna v. Pedda* (1902) 26 Mad. 445.

under the circumstances, "put in issue" after the commencement of the Act, and that the revised section, therefore, applied to the case (c). As to this decision, it may be remarked that it ignores the distinction between a suit "in respect of" a contract and suit in which the contract is "put in issue." The suit was to recover the principal and interest due on the bond, and it was, therefore, "in respect of" the bond. If the bond be said in such a case to be "put in issue," it is difficult to conceive cases in which there could be a suit "in respect of" it. We think that, on the whole, the distinction drawn by the Madras Court between the words "in respect of" and "put in issue" is sound, and that the revised section does not apply unless the suit is instituted after the commencement of the Act, whether it be one "in respect of" the contract, or one in which the contract is "put in issue."

The first paragraph of the section stood as follows before the amendment :—

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named."

Stipulations for interest.—By far the largest number of cases decided under the original paragraph related to stipulations providing for interest. Those stipulations may be divided into the following five classes :—

I. Stipulations for payment of interest at a higher rate on default on the part of the debtor to pay the principal or part thereof or interest on the due date, and these may again be subdivided into.

(a) Stipulations for payment of enhanced interest from the *date of the bond*, and

(b) Those for payment of such interest from the *date of default* ;

II. Stipulations for payment on default of compound interest, which may be subdivided into.

(a) Stipulations for payment of compound interest at the same rate as simple interest, and

- S. 74. (b) Those for payment of compound interest at a rate higher than simple interest, or for payment of an increased rate of interest and compound interest at that rate;

III. Stipulations for payment of interest at a specified rate if the principal or a part thereof is not paid on the due date;

IV. Stipulations for payment of interest at a lower rate if interest paid on due dates.

V. Stipulations for payment of interest from the date of the bond, but at an exorbitant rate.

There has been considerable conflict in the decisions of the several High Courts on the section in its original form, especially as regards stipulations comprised in Class I. That section applied only to contracts in which a sum was *named* as the amount to be paid in case of the breach thereof, and the conflict arose owing to different interpretations put upon the expression "*named*." The section has been amended to put an end to the divergent views taken by the Courts, and is now "*amplified so as to make it apply in terms to all stipulations by way of penalty, whether the penalty consists of a sum named or not*" (d).

The stipulations comprised in the above classes and the effect of the amendment are considered below:—

I. Stipulations for enhanced rate of interest.—Such a stipulation occurring in a contract may be of a twofold character: (1) it may either provide for payment of interest at an increased rate from the *date of the contract* on failure of the debtor to pay on the due date the interest or principal or an instalment of principal, or (2) it may provide for payment at a higher rate from the *date of default* only. Thus if A. borrows Rs. 1,000 from B. on 1st June, 1902, A. may give a bond to B. for the repayment of the loan on 1st June 1903, with interest at 12 per cent. per annum, with a stipulation either that in case of default interest shall be payable at the rate of 25 per cent. from the *date of the bond*, namely, 1st June, 1902, or from the *date of default*, namely, 1st June, 1903. In

(d) See Bombay Government Gazette, 1898, Part VI, p. 36 (Statement of Objects and Reasons).

the former case it has been held that the stipulation *always* (e) amounts to a penalty, and the provisions of s. 74 apply, so that the Court may relieve the debtor, and award only such compensation to the creditor as it considers reasonable (f). In the latter case, where the increased rate of interest is stipulated to have operation only from the date of default, the provision has not generally been regarded as a penalty (g). The section as it stood before the amendment required as one essential condition that there should be "a sum named in the contract as the amount to be paid in case of breach." Where the stipulation for the higher rate of interest is to operate from the date of the bond, there is invariably in such a case "a sum named in the contract as the amount to be paid in case of breach." Thus in the illustration given above A. would be liable on default to pay B. Rs. 1,250, though, if he repaid the loan on the due date, the principal with interest would have amounted to Rs. 1,120 only. But no such sum can be said to be named in the contract, where the increased rate is to commence from the date of default, for "at the moment of the breach no larger sum can be exacted by the creditor." The distinction

S: 47.

(e) The leading case on the subject is *Mackintosh v. Crow* (1883) 9 Cal. 689. The result of the cases will be found summarised in *Umarkhan v. Salekhan* (1892) 17 Bom. 106, 113, 114, and in *Abdul Gani v. Nandlal* (1902) 30 Cal. 15, 17. In the former case it is stated that a stipulation for a higher rate of interest is "generally" a penalty, in the latter that it has "always" been held as a penalty. The current of decisions justifies the use of the latter expression.

(f) *Muthura Persad v. Luggun Koer* (1883) 9 Cal. 615; *Sungut Lal v. Baijnath Roy* (1886) 13 Cal. 164; *Kalachand Kyal v. Shib Chunder* (1892) 19 Cal. 392; *Rameshwar Prosad Singh v. Rai Sham Kishen* (1901) 29 Cal. 43, 50; *Sajaji v. Maruti* (1889) 14 Bom. 274; *Trimbak v. Bhagchand* (1902) 27 Bom. 21; *Vengideswara v. Chatu Achen* (1881) 3 Mad. 224; *Vythilinga v. Sundarappa* (1882) 6 Mad. 167; *Nanjappa v.*

Nanjappa (1888) 12 Mad. 161; *Gopaludu v. Venkataratnam* (1894) 18 Mad. 175; *Khurram Singh v. Bhawani Bakhsh* (1881) 3 All. 440; *Kharag Singh v. Bhola Nath* (1881) 4 All. 8; *Narain Das v. Chait Ram* (1884) 6 All. 179. See also *Rasnji v. Sayana* (1869) 6 B. H. C. A. C. 7; *Bichook Nath v. Ram Lockun* (1873) 11 B. L. R. 135; *Sunder Koer v. Rai Sham Krishen* (1907) 34 Cal. 150, 157, L. R. 34 Ind. Ap. 9.

(g) *Mackintosh v. Hunt* (1877) 2 Cal. 202; *Mackintosh v. Crow* (1883) 9 Cal. 689; *Deno Nath v. Nibaran Chandra* (1899) 27 Cal. 421, 425; *Abdul Gani v. Nandlal* (1902) 30 Cal. 15; *Dullabhdas v. Lakshmandas* (1889) 14 Bom. 200; *Umarkhan v. Salekhan* (1892) 17 Bom. 106; *Jaganadham v. Ragunadha* (1886) 9 Mad. 276; *Periasami Thalavar v. Subramanian Asari* (1904) 14 Mad. L. J. 136; *Tek Chand v. Morice* (1877) Punj. Rec. no. 5; *Honda Mal v. Muhamad Baksh* (1879) Punj. Rec. no. 61.

8. 74. between the two classes of cases was thus stated by the Madras High Court :—

“ By the cases in this country it is well established that an agreement to pay a sum of money on a given day with interest at a certain rate, with a stipulation that in default the debtor shall *thence forward* pay a higher rate of interest, is strictly enforceable. In such an agreement no question of penalty arises, because it imposes [no] obligation on the debtor to pay a larger sum than what was originally due. In the words of s. 74 of the Contract Act, no sum is *named* as the amount to be paid in case of such breach. At the moment of the breach no larger sum can be exacted by the creditor, but from that date the terms on which the debtor holds the money become less favourable. By the default he accepts the alternative arrangement of paying a higher rate of interest for the future. On the other hand, where the stipulation is that on default the higher rate shall be payable from the *date of the original obligation*, the debtor does on default, become immediately liable for a larger sum, viz., the difference between the enhanced and the original rate of interest already due ” (h).

It has been stated above that a stipulation for an increased rate of interest from the *date of default* is not generally a penalty ; but such a stipulation *may* in some cases be penal. Whether it is a penalty or not is a question of construction. “ It is for the Court to decide on the facts of the particular case whether the stipulation is or is not a stipulation by way of penalty ” (i). In each of these cases the decision of the question depends, in effect, upon the construction of the document, and upon ascertaining what the parties really intended by it (j). “ Such a contract as to interest must, we think, be held valid where there is no question of fraud or oppression, improper dealing, exorbitant amount, dealing with an ignorant person, or the like considerations ” (k). For “ it is of the utmost importance as regards contracts between adult persons not under disability and at arm’s

(h) *Nanjappa v. Nanjappa* (1888) 12 Mad. 161, 166, 167.

(i) *Abbakke Heggadhi v. Kinhiamma Shetty* (1906) 29 Mad. 491, 496.

(j) Per Maclean, C.J., in *Deno Nath v. Nibaran Chandra* (1899) 27 Cal. 421,

424.

(k) *Surya Narain Singh v. Jogendra Narain Roy* (1892) 20 Cal. 360, 364, per Pigot, J., cited in 26 Cal. 300, at p. 310.

length that the Courts of law should maintain the performance of the contracts according to the intention of the parties" (l). On the other hand, the stipulation will be held penal, so as to relieve the debtor from his contractual obligation, if "the enhanced rate be such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties" (m), or where there are equitable considerations which would render the bargain unconscionable. But the relief, where a proper case was made out for it, was granted by the Court in its equitable jurisdiction, and not under s. 74, for the section as it stood before the amendment was held not to apply to the class of stipulations now under consideration (n). The relief granted, however, was the same whether it was under the Court's equitable jurisdiction or under the provisions of the section (o). And as to Act XXVIII of 1855 (repealing usuary laws) it was held that it did not affect the equitable jurisdiction of Courts to relieve against a penalty (n).

How far the amendment in the section made by Act VI of 1899 has affected the case law prior to it may be conveniently considered here. The section as it stood before the amendment applied only to those stipulations for enhanced interest when a sum was named in the contract as the amount to be paid in case of breach. It was held not to apply to any stipulation for increased interest when the higher rate commenced from the *date of default*. Relief, therefore, where such a stipulation was penal, was given not under the provisions of the section, but in the exercise of the Court's equitable jurisdiction. The section as it now stands brings within its operation all stipulations in the nature of a penalty, as will be seen from the words "any other stipulation by way of penalty." The result, therefore, is that in the case of a stipulation for a higher rate of interest from the *date of default* relief will now be granted, wherever such a stipulation is penal, under the provisions of this section (p), and it will not be necessary for

(l) *Wallis v. Smith* (1882) 21 Ch. Div. 243, cited in 27 Cal. 421, 424. *endra Roy v. Serajuddin Ahmed* (1898) 2 C. W. N. 234; *Manoo Bepari v. Durga*

(m) Per Sargent, C.J., in *Umarkhan Churn Saha* (1898) 2 C. W. N. 333; *v. Salekhan* (1892) 17 Bom. 106, 113, *Abdul Gani v. Nandal* (1902) 30 Cal. 15, 114.

(n) *Umarkhan v. Salekhan* (1892) 17 Bom. 106; *Pardhan Bhukhan Lal v* (o) *Abdul Gani v. Nandal* (1902) 30 Cal. 15, 19.

(p) See *Velchand v. Flagg* (1911) *Narsing Dyal* (1898) 26 Cal. 300; *Ram.* 36 Bom. 164.

- S. 74.** Courts to resort to their equitable jurisdiction to grant relief on that score. In other respects, the law as to stipulations for enhanced rate of interest remains what it was under the old section. The Explanation to the section is simply a legislative recognition of the proposition laid down in the undermentioned cases (*g*) that a stipulation for enhanced interest from the date of default *may* be a stipulation by way of penalty (*r*). Illustration (d), which was added in the Act by Act VI of 1899, is an instance of such a stipulation. The increase of interest from 12 to 75 per cent., is of itself so exorbitant, as, in the language of Sargent, C.J., "to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties" (*s*).

On the whole the law as to enhanced rate of interest under the section as amended may now be stated as follows:—

(a) A stipulation for increased interest from the date of the bond is *always* in the nature of a penalty, and relief will be granted against it.

(h) A stipulation for increased interest from the date of default *may* be a stipulation by way of penalty, and whenever it is so relief will be granted under the section as amended, and not independently of it as before the amendment. Whether such a stipulation is penal is a question of construction dependent upon the considerations set out above.

It should be stated that the current of decisions in Calcutta and Madras laying down the distinction between a proviso for retrospective enhancement of interest and a proviso for enhanced interest from the date of default, and treating the former as a penalty, was for some time broken owing to a decision of the Privy Council in *Balkishen Das v. Ran Bahadur Singh* (*i*). That case related to the construction of a decree which was founded on a *solehnama* between the parties and to the right of the appellant to execute to the extent of the provisions of that decree when properly construed. The decree was for payment

(*g*) *Umarkhan v. Salekhan* (1892) 17. 343, 347.
 Bom. 106, 113, 114; *Pardhan Bhukhan* (*s*) *Umarkhan v. Salekhan* (1892) 17
Lal v. Narsing Dyal (1898) 26 Cal. Bom. 106, 113, 114.
 300, 310. (*i*) (1883) 10 Cal. 305; L. R. 10
 (*r*) *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (1901) 25 Mad. Ind. Ap. 162.

of money by instalments with interest at 6 per cent., and it was construed to provide for three contingencies, one of which was that on default of payment of the first instalment interest should be paid at 12 per cent. *from the date of the decree*. The Judicial Committee held that the stipulation for the higher rate of interest from the date of the decree was not a penalty, and added that, even if it were so, the stipulation was not unreasonable, inasmuch as it was a mere stipulation of interest at 12 instead of 6 per cent. per annum in a given state of circumstances. Following this decision, it was held in some cases (u) that a stipulation in a contract for a higher rate of interest from the *date of the contract* is not unenforceable, and that it cannot be treated as a penalty, but must be interpreted, as other parts of a written contract should be interpreted, according to the expressed intention of the parties. Those cases, however, are no longer of any authority, and in later cases (v) the decision of the Privy Council was held not to be applicable to the class of cases under consideration (x), and the Courts reverted to the former view they had taken of s. 74 as originally enacted. So far as the Allahabad High Court goes, there have been only two cases (x) under the old section since the Privy Council decision, and that decision was followed in both of them. In the later of the two cases it was held

(u) *Baij Nath Singh v. Shah Ali Hosain* (1886) 14 Cal. 248; *Basavayya v. Subbarazu* (1888) 11 Mad. 294; *Narayanasami Naidu v. Narayana Rau* (1893) 17 Mad. 62. See also *Arjan Bibi v. Asgar Ali* (1886) 13 Cal. 200, 203, where the note of discord was first struck; see also *Arulu Mastry v. Wakuthu Chinnayen* (1864) 2 M. H. C. 205.

(v) *Kalachand Kyal v. Shib Chunder* (1892) 19 Cal. 392, overruling *Baij Nath Singh v. Shah Ali Hosain* (1886) 14 Cal. 248; *Baid Nath Das v. Shamanand Das* (1894) 22 Cal. 143; *Pardhan Bhukhan Lal v. Narsing Dyal* (1898) 26 Cal. 300; *Deno Nath v. Nibaran Chandra* (1899) 27 Cal. 421; *Rameswar Prosad Singh v. Rai Sham Kishen* (1901) 29 Cal. 43; *Abdul Gani v. Nandlal* (1902)

30 Cal. 15; *Nanjappa v. Nanjappa* (1888) 12 Mad. 161 (no reference is made in this case to the earlier case of *Basavayya v. Subbarazu* (1888) 11 Mad. 294, which followed the Privy Council decision); *Gopaludu v. Venkataratnam* (1894) 18 Mad. 175; *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (1901) 25 Mad. 343; *Annamalai Chetty v. Veerabadram Chetty* (1902) 26 Mad. 111.

(w) For reasons see *Nanjappa v. Nanjappa* (1888) 12 Mad. 161, 165, 166; *Kalachand Kyal v. Shib Chunder* (1892) 19 Cal. 392, 396; *Umarkhan v. Salekhan* (1892) 17 Bom. 106, 112.

(x) *Banwari Das v. Muhammad Mashiat* (1887) 9 All. 690; *Banke Behari v. Sundar Lal* (1893) 15 All. 232.

- S. 74. by a full Bench of that Court that s. 74 as originally enacted did not apply to an agreement to pay alternative rates of interest whether the higher rate was payable from the date of the contract or from the date of default, on the ground that it could not be said in either case that there was a sum *named* in the contract as the amount to be paid in case of breach (y). The Explanation to the amended section read with illustration (d) makes it clear beyond all doubt that the section as amended applies to stipulations for alternative rates of interest, and the newly added words "any other stipulation by way of penalty" are wide enough to comprise cases in which no sum may be named as the amount to be paid in case of breach (z). And it has now been held by the High Court of Allahabad under the revised section that a stipulation for enhanced interest as from the date of the bond is a stipulation by way of penalty (a).

A. lends money to B. at interest at Rs. 2-8-0 per cent. per month. Subsequently, on a settlement of accounts between the parties, it is agreed that A. should charge interest at the rate only of 8 annas per cent. per month on the balance due, if the same was paid within a certain date; but if not so paid, B. should pay the balance with interest at the original rate of Rs. 2-8-0 per cent. per month. The stipulation for the payment of interest at Rs. 2-8-0 per cent. per month in default

(y) See also *Brij Nath Singh v. Shah Ali Hosain* (1896) 14 Cal. 248, where Mitter, J., said: "In either of the cases mentioned above no amount is named in the contract as the amount to be paid in case of breach. It is true that on the date when the breach took place the amount that under the contract would be due on that date to the creditor could be ascertained by arithmetical calculation, but that is not a case where it can be said that at amount is named in the contract as the amount to be paid in case of a breach. Then, again, the amount which may be ascertained by such calculations is not the whole amount which is named in the contract as the amount to be paid in case of a breach, even if it be conceded that the use of the word

'named' does not make any difference. The whole amount which in consequence of the breach would be payable to the creditor cannot be precisely ascertained on the date of the breach even by arithmetical calculation, because the breach continues so long as the money is not repaid after due date, and, therefore, to use the language used in the judgment of Mr. Justice Wilson, 'no one can say at the time of the breach what the sum will be.'"

(z) In *Annamalai Chetty v. Veerabhadram Chetty* (1902) 26 Mad. 111, it was assumed that the section as amended applied to cases of alternative rates of interest.

(a) *Brij Bhukhan v. Sami-ud-din* (1902) 25 All. 169.

of payment of the balance within the fixed period is not by way of penalty. "Here the higher rate of interest was only that *originally payable* under the bond : and the new bargain was merely a concession to the [debtor] of which he failed to take advantage. This is not the case of a lower rate of interest being mentioned in the bond, with a provision that, if the debt be not paid, a higher rate shall prevail as from the date of the loan" (b).

II. Stipulations for compound interest (c).—A stipulation in a bond for payment of compound interest on failure to pay simple interest at the same rate as was payable upon the principal is not a penalty within the meaning of this section (d). But a stipulation for the payment of compound interest at a rate higher than that of simple interest is a penalty within the meaning of this section, and would be relieved against. As observed by the Judicial Committee in *Sunder Koer v. Rai Sham Krishen* (e), "compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty." Thus where a bond provided that interest should be payable at the end of each year at the rate of Rs. 1-4 per cent. per mensem, and that in default compound interest should be paid at the increased rate of Rs. 3-2 per cent. per mensem, it was held that the stipulation was one by way of penalty, and the Court allowed compound interest at the same rate as simple interest (f).

(b) *Kirti, Chunder Chatterji v. Atkinson* (1906) 10 C. W. N. 640.

(c) "The Courts do not lean towards compound interest, they do not award it in the absence of stipulation; but where there is a clear agreement for its payment it is, in the absence of disentitling circumstances, allowed": *Hari Lahu Patil v. Ramji Valad Pandu* (1904) 28 Bom. 371, 377.

(d) *Ganga Dayal v. Bachchu Lal* (1902) 25 All. 26; *Surya Narain v. Jagendra Narain* (1892) 20 Cal. 360; *Bhola Nath v. Fateh Singh* (1883) 6

All. 63; *Janki Das v. Ahmad Husain* (1902) 25 All. 159; *Mul Singh v. Kishan Gopal* (1904) Punj. Rec. no. 58; *Lekhi Chand v. Pear Chand* (1917) 2 Pat. L. J. 283; *Abdul Ali v. Puran Mal* (1914) Punj. Rec. no. 82, p. 289.

(e) (1906) 34 Cal. 150, at p. 158; L. R. 34 Ind. Ap. 9.

(f) *Baid Nath Das v. Shananand Das* (1894) 22 Cal. 143, 155, 156, followed in *Rameswar Prasad Singh v. Rai Sham Kishen* (1901) 29 Cal. 43, 51; *Annamalai Chetty v. Veerabadram Chetty* (1902) 28 Mad. 111.

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Similarly it was laid down in an Allahabad case that a stipulation that in default of payment of interest when due the debtor should pay an increased rate of interest as well as compound interest amounts to a penalty (g). The ground of the decision was that the two stipulations put together could not be regarded as a fair agreement with reference to the loss sustained by the lender by reason of the breach of the contract. By the terms of the bond in that case the interest was to be at the rate of 9 per cent. per annum, and was payable yearly, and there was a proviso that if it was not paid when due it should be increased to 15 per cent. per annum, and should be calculated as compound and not as simple interest (h). This case was dissented from by the Madras High Court. The bond in that case provided that, if any instalment of interest (which was 2 per cent. per mensem) was not paid on the due date, the debtor should pay compound interest at the same rate "from the expiry of the instalment," and that, if the principal was not paid within a year, he should "from that date" pay interest at an enhanced rate, namely, 3 per cent. per mensem. The Court said that the only question was whether an agreement to pay an increased rate of interest as well as compound interest amounted to a penalty, and held that there was nothing penal in the bond, putting the decision on the ground that, if parties enter into extortionate bargains with their eyes open, they are not entitled to relief unless the unfair nature of the transaction was not known to them, advantage having been taken of youth, ignorance, or credulity (i).

No reference was made in either of these cases to s. 74 of the Act. It is submitted that the facts in the two cases were quite different and gave rise to different questions. In the Allahabad case the debtor

(g) *Dip Narain Rai v. Dipan Rai* (1888) 8 All. 185.

(h) The Court reduced the interest to Rs. 9 per cent. per annum reckoned at compound interest with yearly rests up to the due date of payment.

(i) *Appa Rau v. Suryanarayana* (1887) 10 Mad. 203. The terms of the bond as respects interest were as follows: "Should I so fail to pay the amount of interest, I shall pay the interest as 2 per cent. per month, as stated above on the amount of the

interest also from the expiry of the instalment. I shall pay the principal, the amount of interest due, and the amount of interest thereon within one year. Should I fail to clear a year hence the whole amount due to you, I shall pay you the whole of the amount due together with interest on it from that date at the rate of 3 per cent. per month." See *Abbakke Heggaiah v. Kinhiamma Shetty* (1906) 29 Mad. 491, at p. 496.

became liable on default to pay a higher rate of interest not from the *date of default*, that is, the date on which the instalment of interest became due, but, so far as it appears from the report, from the date of the commencement of each instalment of interest (*j*). This stipulation would of itself be now regarded as penal independently of the condition for payment of compound interest. But the liability on default under the terms of the bond was not only to pay the enhanced rate from the date of the commencement of each instalment, but also compound interest at that rate—a stronger case than the one which merely provides for compound interest at a rate higher than simple interest. In the Madras case, on the other hand, the first stipulation for compound interest at the same rate as simple interest was lawful, though the second stipulation for payment of interest at an increased rate from the *date of default* (*k*) may or may not be one by way of penalty according to the circumstances of the case (see Explanation to the section, p. 422, above).

The distinction has been explained by the Judicial Committee: "The Indian Courts have invariably held that where (as in the present case) the stipulation is retrospective and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered as a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor. Their Lordships accept that view of the statute" (*l*).

A stipulation that interest in arrear shall be capitalised and added to the principal sum and that the whole shall carry interest at the *contract* rate is not by way of penalty (*m*).

III. Stipulations for payment of interest if principal not paid on due date.—We next proceed to consider cases where the bond does not provide for the payment of two rates of interest, one lower and the

(*j*) The terms of the bond are not set out in the report. The only other construction would be that the higher rate was to be paid from the date fixed for the *payment of the instalments* with compound interest, in which event the case would be one of payment of compound interest at a rate higher than that of simple interest.

(*k*) The words in the bond are "from that date," which obviously mean "from the expiration of the year" being the period of the loan.

(*l*) *Sundar Koer v. Sham Krishen* (1906) L. R. 34 Ind. Ap. 9, 17; 34 Cal. 150.

(*m*) *Sarju Prasad v. Beni Madho* (1883) AIL W. N. 208.

S. 74. other higher, but for the payment of interest at one specified rate if the principal money or part thereof is not paid within a stipulated period. The decisions on the subject are not quite uniform and require examination. But before doing so it may be as well to note the provisions of Act XXVIII of 1855, as they have a close bearing on the subject. That Act abolished all usury laws, and s. 2 thereof provides that "in any suit in which interest is recoverable the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and if no rate shall have been agreed upon at such a rate as the Court shall deem reasonable." It will have been observed from what has preceded that the provisions of the Act of 1855 do not apply, and the Court will not decree interest at the agreed rate where the agreement provides for alternative rates of interest, and the stipulation for the higher rate of interest is one by way of penalty. Such stipulations would now come within the scope of s. 74, and the provisions of the said Act are so far modified by that section (*n*). Where, however, there is a stipulation for a single rate of interest, the question arises whether the provisions of s. 2 of Act XXVIII of 1855 invariably apply to all such cases, so that the Court should award the agreed rate of interest, or whether any relief could be granted where such rate appears to the Court to be penal, and if so whether this could be done under s. 74 as now amended. In *Motoji v. Shekh Husen* (*o*), where a promissory note, after stipulating for payment by monthly instalments *without interest*, provided for interest at the rate of 75 per cent. per annum in default of payment of any one instalment, it was held by the High Court of Bombay that the stipulation for interest was a penalty. In *Pava v. Govind* (*p*) a promissory note provided for repayment of principal *without interest* within three months from the date thereof, and that in default interest should be paid at 75 per cent. per annum. It was held by the same Court, following *Motoji v. Shekh Husen* (*q*), that the rate of interest was a penalty, and that Act XXVIII of 1855 did not destroy the

(*n*) The contrary view taken in *Baij Nath Singh v. Shah Ali Hosain* (1896), 14 Cal. 248, and *Banke Behari v. Sundar Lal* (1893) 15 All. 232, 236 *et seq.* cannot now be sustained.

(*o*) (1869) 6 B. H. C. A. C. 8.

(*p*) (1873) 10 B. H. C. 332.

(*q*) With which case, it was said, the case was on all fours: *Id.* 333.

equitable jurisdiction of the Courts to relieve against a penalty (r). S. 74
 In *Bansidhar v. Bu Ali Khan* (s) the defendant agreed to repay to the plaintiff a loan of Rs. 50 on a certain date, and in default to pay interest at Re. 1 per day, that is, at the rate of Rs. 730 per cent. per annum. It was held by the High Court of Allahabad that, looking at the entire instrument, the amount of interest appeared to be in the nature of a penalty because "one rupee per diem for failure to pay Rs. 50 is, as interest, an extortionate amount, for which no adequate consideration is shown, and which no man would contract absolutely to pay." As to s. 2 of Act XXVIII of 1855, it was said that if the terms of that section strictly applied in every case it would be impossible to say to what extravagant and extortionate extent the most usurious claims under the name of "interest" might not be carried. In a later Allahabad case (t) a stipulation to pay the amount of a bond on a

(c) In *Dallabhdas v. Lakshmandas* (1889) 14 Bom. 200, Scott, J., said that the case of *Pava v. Govind* dealt with an agreement which, on default in payment of the original rate, imposed the enhanced rate on the defaulting party from the date of the original debt. In *Umarkhan v. Salekhan* (1892) 17 Bom. 106, on the other hand, Sargent, C.J., said that an examination of the facts in *Motaji v. Shekh Husna* and *Pava v. Govind* left no doubt that the Court was in that case dealing with prospective enhancement of interest. See also *Hakim Manji v. Memna Ayob* (1870) 7 B. H. C. 19, where the same view was taken. It may be noted that *Umarkhan v. Salekhan* was referred to a Full Bench, and the Divisional Bench, in making the order of reference, said: "Having regard to the conflict of decisions between *Pava v. Govind* . . . on the one hand and *Dallabhdas v. Lakshmandas* on the other, we think it right to refer it to a Full Bench to decide whether a clause in a bond enhancing the rate of interest on default of payment of the principal debt and interest at the time fixed is to be regarded as a penalty." How the two

decisions were conflicting it is not easy to see; for *Pava v. Govind* was not a case of alternative rates of interest (see this statement borne out in *Banke Behari v. Sundar Lal* (1893) 15 All. 232, 255); while in *Dallabhdas v. Lakshmandas* there were two rates of interest, and the higher rate was payable from the date of default, and the Court held it was not a penalty. In the Full Bench case, Sargent, C.J., was inclined to think that the decision in *Pava v. Govind* could be supported on the ground that the enhanced rate of interest in that case was such as to lead to the conclusion that it could not have been intended to be part of the primary contract between the parties: 17 Bom. pp. 113, 114.

(s) (1880) 3 All. 260; *Chuhar Mal v. Mir* (1880) 2 All. 15, where the interest payable on default was Rs. 3-2-0 per cent. per mensem, and the Court held that it was penal. In *Maya Ram v. Naubat* (1885) All. W. N. 62, the rate was 24 per cent. per annum, and it was held to be not penal.

(t) *Kunjbehari Lal v. Nahi Baksh* (1883) 6 All. 64.

§ 74. certain day without interest and in default to pay interest at the rate of 24 per cent. per annum was held to be not penal on the ground that the interest claimed was "contract interest." The Court added that, even if it had been penal, the rate was not so exorbitant that the Court would be justified in reducing it. None of these cases were decided with reference to s. 74. In *Vythilinga v. Ravana* (u) the defendant agreed to repay a loan of Rs. 10 within fifteen days, and in default to pay interest at the rate of one anna per rupee per diem, that is at the rate of Rs. 2,250 per cent. per annum. The Madras High Court held that the stipulation for interest was penal, one of the learned Judges holding that the case was covered by s. 74, and the other doubting whether that section affected the case at all, but both following an earlier decision (v) of the same Court, which, however, was a case of alternative rates of interest.

In *Arjan Bibi v. Asgar Ali* (w) the bond provided for the repayment of the loan within a certain period, and in default for interest from the date of the bond at 150 per cent. per annum. The High Court of Calcutta awarded interest at the agreed rate, holding that the agreement was one for payment of interest within the meaning of s. 2 of Act XXVIII of 1855, and did not fall under s. 74, as there was only one rate of interest agreed to be paid, and the bond did not provide for the payment of two rates of interest. The same view has been taken by the Chief Court of the Punjab (x). In *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (y) the bond provided for the payment of the principal by twelve instalments, and it was provided that in default the debtor should pay the whole amount of the loan on demand with interest at the rate of 180 per cent. per annum. It was held by the Madras High Court, dissenting from *Bansidhar v. Bu Ali Khan* (z), and approving *Arjan Bibi v. Asgar Ali* (a), that, only one rate of interest having been provided for, the case was not governed either by s. 74 as it formerly stood, or by the amended section, and that the

(u) (1882) 6 Mad. 167.

(v) *Vengidenavara v. Chatu Achen* (1881) 3 Mad. 224.

(w) (1886) 13 Cal. 200.

(x) *Gokal Chund v. Khwaja Ali* (1890) Punj. Rec. no. 32. But see *Kanhaya Lal v. Narain Das* (1894) Punj. Rec. no. 99.

(y) (1901) 25 Mad. 343; *Chinna v. Pedda* (1902) 26 Mad. 445. (The rate of interest in this case was 12 per cent. per annum.)

(z) (1880) 3 All. 260. See note (s), above.

(a) (1886) 13 Cal. 200.

plaintiff was entitled to interest at the agreed rate under Act XXVIII of 1855, as that rate could not be said to be exorbitant, "having regard to the relations between the parties and the circumstances in which the defendant undertook the obligation which he failed to fulfil" (b). In *Prayag v. Shyam Lal* (c) it was held by the High Court of Calcutta that simple or compound interest (which was 75 per cent. per annum in the case) is not in itself penalty. The interest in that case ran from the date of the bond, and was not payable on default only of payment of the principal sum as in the preceding cases. The case, therefore, does not belong to the group of cases now under examination, but it is noted here, as the Court said that the case was governed by the revised section.

It will have been seen that in *Motoji v. Shekh Husen* (d), *Pava v. Govind* (e), *Bansidhar v. Bu Ali Khan* (f), and *Vythilinga v. Ravana* (g), cited above, the exorbitant rate of interest was of itself regarded as penal. On the other hand, in *Arjan Bibi v. Asgar Ali* (h) and *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (i), the Court declined to grant any relief, though the rate of interest in one case was 150 per cent. per annum, and in the other it was 180 per cent. The effect of these two decisions as well as the decisions in *Prayag v. Shyam Lal* is that, the rate of interest having been agreed upon between the parties, it should be allowed under the provisions of Act XXVIII of 1855, and the mere fact that the rate of interest is exorbitant is no ground of relief unless the transactions amounts to an "unconscionable bargain." The principle of these decisions, it is submitted, is not sound, for, following it to its logical consequences, any rate of interest, however exorbitant, would not be regarded as penal. The correct principle, it is conceived, is the one laid down in the first group of the cases mentioned above, namely, that relief should be granted whenever the rate of interest appears to the Court to be penal notwithstanding the provisions of the Act. This view had been

(b) 25 Mad., pp. 346, 349.

(c) (1903) 31 Cal. 133. See also *Krishna Kumar v. Brojo Nath Roy* (1903) 7 C. W. N. 876, where a loan of Rs. 300 carried compound interest at the rate of Rs. 5 per month, and interest was awarded at that rate.

(d) (1869) 6 B. H. C. A. C. 8.

(e) (1873) 10 B. H. C. 332.

(f) (1880) 3 All. 260.

(g) (1882) 6 Mad. 167.

(h) (1886) 13 Cal. 200.

(i) (1901) 25 Mad. 343.

S. 74. adopted by the High Court of Calcutta in *Miajan Patari v. Abdul Juhhar* (j), where it was held, dissenting from *Arjan Bibi v. Asgar Ali* (k) and *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (l), that a stipulation for the payment of interest at the rate of 75 per cent. per annum from the date of the bond, on failure to pay the principal sum in two instalments on the dates fixed, was in the circumstances of the case a penalty. There are later decisions to the same effect by a full Bench of the Madras High Court (m), who held, dissenting from *Sankaranarayana Vadhyar v. Sankaranarayana Ayyar* (l), that where no interest is payable until default, but interest at an exorbitant rate is payable as from the date of default, the Court has power to treat the latter stipulation as a penalty; and by the High Court of Bombay, following its previous opinion (n).

Before the amendment of the section relief was properly granted by Courts in the class of cases under consideration in the exercise of their equitable jurisdiction, for s. 74 as originally enacted could not apply to the case. Whether after the amendment relief should be granted under the amended section is open to some doubt. On the one hand, the section as now amended extends to "any.....stipulation by way of penalty," and this expression is wide enough to cover the class of cases now under consideration, and this is now the opinion of almost all the High Courts (o). On the other hand, the subject-matter of the section relates to what is known in English law as the doctrine of penalty and liquidated damages, and stipulations for interest of the class we are now dealing with do not fall under either of those two heads. If so, we venture to think that where a proper case is made out for relief the Courts could grant it as before under their equitable jurisdiction. The question is not, however, of

(j) (1906) 10 C. W. N. 1020; *Khagaram Das v. Ramsankar Das* (1915) 42 Cal. 652; *Abdul Majeed v. Khirode Chandra Pal* (1915) 42 Cal. 690, pp. 698-699; *Upendra Lal v. Mehraj Bibi* (1916) 21 C. W. N. 108; *Nabo Kumar v. Syed Abdul* (1916) 21 C. W. N. 112, the last two being cases under the Bengal Tenancy Act, 1885.

(k) (1886) 13 Cal. 200.

(l) (1901) 25 Mad. 343.

(m) *Mutukrishna v. Sankara Lingam* (1913) 36 Mad. 229.

(n) *Velchand v. Flagg* (1911) 36 Bom. 164.

(o) *Mutukrishna v. Sankar* (1913) 36 Mad. 229; *Khagaram Das v. Ramsankar Das* (1915) 42 Cal. 652; *Velchand v. Flagg* (1911) 36 Bom. 164.

much practical importance, for the relief, however granted, would be the same in its nature and extent. S. 74.

IV. Stipulations for payment of interest at a lower rate, if interest paid regularly on due dates.—Where a bond provides for payment of interest at 24 per cent. per annum with a proviso that, if the debtor pays interest punctually at the end of every year, the creditor would accept interest at the rate of 18 per cent. per annum, the creditor is entitled on failure of payment of interest on the due date to interest at the higher rate of 24 per cent. per annum. Such a clause is not in the nature of a penalty (*p*). In a recent Calcutta case the stipulation was for payment of interest at $9\frac{1}{2}$ per cent., to be reduced to $7\frac{1}{2}$ per cent. on punctual payment, but the scheme for liquidation of the mortgage debt which was a material part of the mortgage deed showed that interest was calculated at $7\frac{1}{2}$ per cent. only. Upon these facts the Court held that the stipulation for payment of $9\frac{1}{2}$ per cent. was a penalty, and it allowed interest at $7\frac{1}{2}$ per cent. and further interest upon interest at $7\frac{1}{2}$ per cent. in respect of payment, not punctually made (*q*).

V. Stipulations for payment of interest from date of bond, the rate of interest being exorbitant.—The question to be considered under this head is, whether a stipulation for payment of interest can be deemed a “stipulation by way of penalty” within the meaning of this section, if the bond provides for payment of interest at one rate from the date of the bond, provided the rate is high and exorbitant. This may be put in the form of an illustration thus :—A. borrows Rs. 500 from B. on 15th October 1917 and gives him a bond for that amount promising to pay the principal with interest thereon at the rate of 75 per cent. per annum on 15th January 1918. A. does not repay the loan on 15th January 1918. B. sues A. to recover the amount of the loan with interest at 75 per cent. per annum. Is B. entitled to interest at the rate of 75 per cent. per annum or has the Court power under this section to reduce the rate of interest? It is assumed that B. was not

(*p*) *Kutub-Ud-Din v. Bashir-Ud-Din* 685, 702.

(1910) 32 All. 448; *Wallis v. Smith* (*q*) *Shyampeary v. The Eastern* (1882) L. R. 21 Ch. D. 261; *Wallingford Mortgage & Agency Co., Ltd.* (1917) 22 v. *Mutual Society* (1880) L. R. 5 A. C. Cal. W. N. 226, 241-245.

S. 74. in a position to dominate the will of A. within the meaning of s. 16 above (r) and that the only question to be considered is whether the Court has power under the present section to reduce the rate of interest. It has been held by the High Court of Calcutta that there being a *breach* of the contract by A. as contemplated by this section, the only other point to consider is whether the stipulation to pay interest at the rate of 75 per cent. per annum is a "*stipulation by way of penalty*" within the meaning of this section. Whether the stipulation to pay interest at the rate of 75 per cent. per annum is a stipulation by way of penalty is, according to that Court, a question of fact depending on the circumstances of each case, and if the Court finds that the rate of interest is of a penal character, the Court has power under this section to grant relief (s). On the other hand, it has been held by the High Court of Madras that the present section does not apply to cases like the above, the reason given being that there cannot be a stipulation by way of penalty unless there is another antecedent promise. "If the promise is to pay a certain sum on a particular day and in default of payment on that day to pay interest, then the agreement to pay interest may be a stipulation by way of penalty" (t). The Madras decisions, it is submitted, are correct. It appears from the judgments of the Calcutta High Court that the only portions of the present section which that Court considered material for the determination of the question before them were (1) "when a contract has been broken," and (2) "If the contract contains any other stipulation by way of penalty." The learned Judges do not seem to have taken into consideration the words "in case of such breach" and the words "the party complaining of the breach is entitled, whether or not actual damage or loss is proved to

(r) See notes to s. 16, "*Unconscionable bargain*". See also *Gopeshwar v. Jagan Chandra* (1916) 43 Cal. 632, at p. 639.

(s) *Krishna Charan v. Sanat Kumar Das* (1917) 44 Cal. 162 [rate reduced from 75 per cent. to 15 per cent.]; *Bonwang Raja Chellaphroo v. Banga Behari Sen* (1915) 20 C. W. N. 408 [rate reduced from 48 per cent. to 12 per cent.]; *Abdul Majeed v. Khirode Chandra Pal* (1914) 42 Cal. 690 [rate reduced from 60 per cent. compound interest to 30 per cent.

simple interest]. See also *Gopeshwar v. Jagan Chandra* (1916) 43 Cal. 632, at p. 639.

(t) *Ponnusami v. Nadimuthu* (1917) 33 Mad. L. J. 302; *Kesavulu v. Arithulai* (1913) 36 Mad. 533. See in this connection *Debi Sahai v. Ganga Sahai* (1910) 32 All. 589, and *Gendan Lal v. Shahzad* (1913) 11 All. L. J. 155, where s. 74 was not considered.

have been caused *thereby* to receive from the party who has broken S. 7 the contract reasonable compensation not exceeding. . . . the penalty stipulated for." These words read with what precedes indicate unmistakably that the penalty stipulated for is one payable "in case of breach" in other words, a penalty which arises *in default* of performance. The language of *ills.* (d), (e), (f), and (g) also points the same way. This view is further strengthened if it be remembered that the compensation contemplated by this section is that paid for the breach of the contract. In the case put above the contract is to repay the amount of the loan with interest. The breach takes place if A. fails to pay the loan with interest. There is no sum named in the contract as the amount to be paid "in case of such breach", nor does the contract contain any *other* stipulation by way of penalty, that is penalty payable *in case of such breach*. To such a case, is respectfully submitted, the present section does not apply. It seems preposterous to say that 75 per cent. per annum or any lower rate of interest which the Court may award is "*compensation*" for breach of the contract. The Patna High Court has taken much the same view as the Madras High Court (*u*). It is not necessary, however, to pursue this matter any further, for cases of the kind now under consideration arising since the enactment of the Usurious Loans Act, 1918, will be dealt with under that Act. That Act empowers the Court to relieve against exorbitant interest where (1) the interest is excessive and (2) the transaction was substantially unfair: see s. 3 of the Act.

Deposit on agreement for purchase.—See notes to s. 78 under the head "Earnest", p. 463 below.

Forfeiture of Salary.—Where under the terms of a contract of employment it is agreed that the servant shall forfeit all arrears of wages that had not yet become payable though due, in default of giving his employer notice before leaving his service, the stipulation is not by way of penalty, nor is it illegal under s. 23. Thus where a servant is engaged by the month, and the salary of each month is to be paid on the 22nd of the next month, and 15 days' notice is to be given before leaving service, the servant leaving on 20th April without giving notice is not entitled to his salary either

(u) *Nathuni Sahu v. Baijnath Prasad* (1917) 2 Pat. L. J. 212, pp. 213-218.

74. for March which had become (due though not payable) or the broken period of April (v). But a stipulation that an employee should work on holidays, including Sundays, if required by the employer to do so, and should be liable on refusal to forfeiture of 15 days' wages, has been held to be in the nature of a penalty and one which the Court should not enforce (w).

"Reasonable compensation".—The words of the section give a wide discretion to the Court in the assessment of damages. "The only restriction is that the Court cannot decree damages exceeding the amount previously agreed upon by the parties. The discretion of the Court in the matter of reducing the amount of damages agreed upon, is left unqualified by any specific limitation, though, of course, the expression 'reasonable compensation' used in the section necessarily implies that the discretion so vested must be exercised with care, caution, and on sound principles" (x). In the exercise of this discretion the Judicial Committee has affirmed a judgment giving, as reasonable in the particular case, compensation at the same rate as the increased interest stipulated for (y). And generally it is open to the Court under this section to award as compensation a sum equal to the agreed penalty, provided that it does not appear to the Court to exceed what is reasonable (z). Where the defendants agreed to deliver a certain quantity of indigo plant to the plaintiff on a certain day, and in default to pay a certain sum as damages, it was held that the plaintiff was not entitled to anything more than "reasonable compensation." "The method of assessing damages," it was said, "would be to ascertain the quantity of indigo which would have been pressed out of the stipulated amount of indigo plant, to ascertain the price at which indigo might have been fairly sold in the market during the season to which the contract relates, and to deduct from such price the ordinary charges of producing and selling the quantity

(v) *Empress of India Cotton Mills Co. v. Naffer Chunder* (1898) 2 C. W. N. 687; *Aryodaya Sps. & Wg. Co. Ltd. v. Siva Virchand* (1911) 13 Bom. L. R. 19.

(w) *Amar Singh v. Karam Singh* (1914) Punj. Rec. no. 50 p. 167.

(x) *Nait Ram v. Shih Dai* (1882) 5 All. 238, 242. Distinguished in *Dilbar Sarkar v. Joyari Kurmi* (1898) 3 C. W. N. 43, where it was held, having re-

gard to the object of the agreement, that the measure of compensation was not merely the actual loss sustained by the plaintiff as in *Nait Ram's* case.

(y) *Sundar Koer v. Sham Krishen* (1906) 34 Cal. 150; L. R. 34 Ind. Ap. 9.

(z) *Abbakke Heggadhi v. Kinkhanna Shetty* (1906) 29 Mad. 491, 496; *Mir Hazar Khan v. Sawan Ali* (1910) Punj. Rec. no. 81.

of indigo in question" (a). Similarly it has been held by the High Court of Bombay that the measure of damages for breach of a contract to borrow moneys at interest for a certain period is not the difference between the agreed rate of interest and that realised by the lender from his bankers for the full period of the loan, but only for such period as might be reasonably required to find another borrower of a similar amount at the agreed rate (b). In a recent Calcutta case (c) the defendant executed a *kabuliat* by which he agreed to pay rent at rates of eight annas, four annas, and two annas per bigha for a period of seven years, and, if he cultivated the lands on the expiry of the term without executing a fresh *kabuliat*, to pay rent at a uniform rate of Rs. 4 per bigha. The defendant continued to hold the land after expiry of the said period without executing a fresh *kabuliat*, and the plaintiff sued for arrears of rent at the rate of Rs. 4. It was held that the stipulation for the higher rate of rent was in the nature of a penalty, and the Court allowed rent at the former rates. Rampini, J., gave a dissenting judgment, holding that s. 74 did not apply, as the suit was not brought on the allegation that a contract had been broken but was one to recover arrears of rent at a rate at which the defendant agreed to pay on his failure to execute a fresh *kabuliat*. The learned Judge further held that the rate of rent mentioned in the *kabuliat* was not named as the amount to be paid in case of a breach of the contract (d). But a stipulation by a tenant that if he failed to deliver at a specified time forty mudis of rice by way of rent (e), and to pay Government revenue and interest due on a mortgage, he would deliver five mudis more of rice, has been held to be not in the nature of a penalty, but liquidated damages (f). This decision was based on the principle enunciated by Jessel, M.R., in *Wallis v. Smith* (g), that "where a deposit is to be forfeited for the breach of a number of stipulations, some of which may be trifling, some of which may be for the payment of money on a given day, in all these cases the Judges have held that this rule (that is, the rule as to penalties) does not apply, and that the bargain of the parties is to be carried out." And upon the same principle where a deposit was made

S. 74.

(a) See note (x), p. 446.

(d) 22 Cal. p. 607.

(b) *Dalubhai v. Abubakar* (1887) 12 Bom. 242.

(e) See Illustration (c), p. 423 above.

(f) *Balkuraya v. Sankamma* (1890) 22 Mad. 453.

(c) *Tejendra Narain v. Bakai Singh* (1895) 22 Cal. 658.

(g) 21 Ch. Div. 243, 258.

- S. 74. with a railway company by the purchaser of a season ticket for one month, and the ticket was issued on conditions one of which was that the ticket was to be delivered up at the office of the company on the day after expiry, and another condition provided that the ticket and all benefit thereof, including the deposit, should be absolutely forfeited to the company if it should be lost, or in case of breach of any of the other conditions, it was held that the ticket-holder was not entitled to a return of the deposit where the ticket was delivered up some few days after the expiry of the month (*h*). In a recent Madras case a contractor agreed with a railway company to supply for a term of 12 months 2,400 tons of fuel at 200 tons per month and deposited with the company Rs. 350 for the due fulfilment of the contract. The contract contained various stipulations as to its proper performance, and empowered the company to cancel the contract and forfeit the deposit if the contractor failed to make punctual delivery in accordance with the terms of the contract and the specification thereto annexed. The contractor having failed in performance of the contract, the company cancelled the contract and forfeited the deposit. The question arose whether in law the deposit was liable to be forfeited. The Court held that it was: "The rule governing the class of cases under consideration is that, where the instrument refers to a sum deposited as security for performance, the forfeiture will not be interfered with, if reasonable in amount." The present section, it was said, did not apply to the case (*i*). Similarly, where the plaintiff agreed to forfeit all arrears of wages if he left the service of the defendant without fifteen days' previous notice, it was held that the present section did not apply, and that the plaintiff by leaving the service of the defendant without giving the required notice forfeited the arrears of wages (*j*). A stipulation in a building contract for a fixed sum to be paid daily or weekly for delay in completing the work seems not to be stipulation by way of penalty (*k*).

(*h*) *Cooper v. London and Brighton Railway Co.* (1879) 4 Ex. D. 88.

(*i*) *Manian Patter v. The Madras Railway Co.* (1906) 29 Mad. 118; *Singer Manufacturing Co. v. Raja Prosad* (1909) 38 Cal. 960.

(*j*) *Empress of India Cotton Mills Co. v. Naffer Chunder Roy* (1898). 2

C. W. N. 687.

(*k*) See *Law v. Redditch Local Board* [1892] 1 Q. B. 127; *cp. Jones v. St. John's College* (1870) L. R. 6 Q. B. 115; these cases are on the Common Law distinction between penalty and liquidated damages (p. 423 above).

Illustration (a).—The case put in this illustration is that of a S. 74. penalty to a common bond to secure the payment of money. It may, however, be noted that where a certain sum of money is due, and the creditor agrees to take a lesser sum if that sum is paid on a certain day, and the debtor in default agrees to pay the larger amount actually due, it is not a case of a penalty (l).

Illustration (b).—This illustration shows that the penalty contemplated by this section may not only be to secure the payment of money, as in illustration (a), but to secure the performance of some collateral act (m). It must be presumed that the agreement mentioned, being in partial restraint of trade, is made in circumstances bringing it within one of the exceptions to s. 27 of the Act.

Illustrations (f) and (g).—A stipulation in a bond by which, on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, is in the nature of a penalty, not because payment is accelerated, but because the amount is enhanced (n). See illustration (g). That a stipulation for merely accelerating payment of the debt is not by way of penalty is shown by illustration (f) (o).

Exception.—An administration bond executed by an administrator in accordance with s. 256 of the Indian Succession Act X of 1865 does not come within the Exception so as to make the obligor liable, upon each of the conditions thereof, to pay the whole amount mentioned therein (p). Similarly a bond given by a person to whom the right of collecting fees from vendors of goods in a market is formed by a Local Board under the Madras Local Boards Act, stipulating that if he exacted fees in excess of the prescribed rates he should be liable to pay any fine not exceeding Rs. 50 imposed by the president of the Board, is a bond "for the performance of a public duty or an act in which the public are interested," but it cannot be said to have been

(l) *Thompson v. Hudson* (1869) L. R. 4 H. L. 1. A proviso for acceptance of interest at a reduced rate on punctual payment is familiar in English mortgage deeds.

(m) See *Sloman v. Walter*, 2 W. & T. L. C., 6th ed. 1257.

(n) *Joshi Kalidas v. Koli Dada* (1888) 12 Bom. 555; *Velchand v. Flagg*

(1911) 36 Bom. 164.

(o) See *Ex parte Burden* (1881) 16 Ch. D. 675. See also *Sterne v. Beck*, 1 De G. J. & S. 595, and *Wallingford v. Mutual Society* (1880) 5 App. Ca. 685.

(p) *Lachman Das v. Chatter* (1887) 10 All. 29.

74, 75. "given under the provisions of any law," for there is no section in the Act which authorises or requires the giving of such a bond. Such a bond, therefore, does not fall within the exception so as to render the contractor liable to pay the full amount of the penalty on breach of the condition of the bond. The Board is only entitled to reasonable compensation not exceeding the amount of the penalty (q). It has been held by the Madras High Court that a contract with a municipality for the lighting of a town whereby it was stipulated that the deposit made by the contractor should be forfeited on any default made by him in carrying out the terms of the contract does not fall within this Exception. "No doubt the public are, in a sense, interested in the proper lighting of the municipal town, but the contract is not one for which any special provision is made in the Municipal Act (District Municipalities Act IV of 1884, Madras), and cannot be placed in a different category to a contract made with any private individual" (r). The amount deposited in the last-mentioned case was Rs. 500, and it was held that it was in the nature of a penalty, and that it could not be enforced since the contract rendered the penalty "altogether irrespective of the importance of the breach." The principle of this decision was dissented from by the same Court in the recent case of *Manian Patter v. The Madras Railway Co.* (s) on the ground that, the case being one relating to a forfeiture of deposit for non-performance, the rule by which it was governed was not the rule as to penalties, but the rule that the Court should not interfere with the forfeiture, if the amount was reasonable.

75.—A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract.

Party rightfully
rescinding contract
entitled to compensation.

Illustration.

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B.

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- (q) *President of the Taluk Board*, (1892) 16 Mad. 474.
Kundapur v. Burde Lakshminarayana (s) (1906) 29 Mad. 118. See note
Kampli (1908) 31 Mad. 54. (i), p. 448, above.
 (r) *Srinivasa v. Rathnasabapathi*

engages to pay her 100 rupees for each night's performance. On the sixth night A. wilfully absents herself from the theatre, and B., in consequence, rescinds the contract. B. is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

Ss. 75, 76.

This section is to be read as supplementary to ss. 39, 53 (which, however, already contains a similar provision), 55, 64, and 65. The facts of the Illustration resemble those of Illustration (a) to s. 39. In such a case the English usage is to describe the promisee's right not as an option to rescind the contract, but as an option to treat it as finally broken and have the damages assessed once for all (see note on s. 39). The difference, however, seems rather verbal than substantial. A party who rescinds on the ground of fraud or the like is in a different position: he rescinds the contract not because fulfilment has been refused or prevented, but because the contract, by reason of the fraud or as the case may be, is altogether to his disadvantage.

CHAPTER VII.

SALE OF GOODS.

When Property in Goods Sold Passes.

76.—In this chapter, the word “goods” means and “Goods” defined. includes every kind of moveable property.

Frame of the chapter.—We now leave the definitions and provisions applicable to contracts generally, and come to the several species of contracts. The present chapter on Sale is almost identical with the original draft of the Indian Law Commissioners, except as to the subject-matter of s. 108, on which there was a difference of opinion between the Commissioners and the Government of India. This, together with an equally acute difference as to the treatment of penal stipulations, led to considerable delay in the passing of the Act, and to the resignation of the Commissioners when they were overruled on both points (Whitley Stokes, *Anglo-Indian Codes*, i. 534). In other respects the amendments made in the Commissioners' work in this chapter are, with very few exceptions, confined to small matters of wording and arrangement.

Goods.—The term “goods” is used here in a much wider sense than in English law. The English definition excludes things in action

§. 76. and money. Hence in seeking illustrations and analogies in the cases decided in the English Courts, recourse may be had to cases which deal with stocks and shares, debentures, and securities of every kind, as well as to those which deal with goods as defined in the English Sale of Goods Act, 1893.

Moveable property.—With regard to the term “moveable property,” the General Clauses Act No. 1 of 1868, s. 2, sub-ss. 5, 6, defines immovable property as including “land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth,” and moveable property as meaning “property of every description except immovable property.”

Old English forms of action.—Many of the English decisions which have settled the law on the sale of goods were in actions under the old system of pleading, founded either on the disturbance of legal possession (trespass), or on acts of dominion violating the plaintiff’s right of property (trover), or on acts by which the plaintiff was prevented from resuming possession (detinue). It may be useful to mention very shortly a few of the leading distinctions. They still exist, with more or less modification, in several American jurisdictions, though in England the plaintiff need only allege sufficient facts to bring his case within one or more of the old forms of action, without stating that he relies on any one of them.

The right to sue in trespass depends on possession existing, the right to sue in trover on an immediate right to possession, at the time of the cause of action. These rights may exist at the same time and may be in different persons.

Generally an owner out of possession cannot sue in trespass, but one who is entitled to resume possession at will, such as a bailor at will, or on a condition determinable at his will, can do so.

A bailee of goods from the owner can have, if the facts are sufficient to support it, any of the above forms of action against a wrongdoer, since he has the legal possession, and is entitled to possess the goods against every one except the bailor, and against him also in many cases.

An owner who is out of possession and not entitled to the immediate possession can have only a special action on the case.

77.—“Sale” is the exchange of property for a price. s.

“Sale” defined. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

Essential requisites of sale.—The exchange of property for a money price is the essential object of the contract of sale. There must be a transfer of property, or agreement to transfer it, from one party, the seller, to the other, the buyer, in consideration of a money payment or the promise thereof by the buyer. Exchange of property for something else than money is not a sale; a contract to barter one kind of goods for another would not, under the old common law system of pleading, support an action for goods sold and delivered (*t*). But if the exchange is made partly for goods and partly for a price the contract would appear to be one of sale (*u*). Similarly if the exchange is made for goods or alternatively for a price (*v*).

The term “price” is here used in its ordinary sense as meaning money only (*w*). See illustrations to s. 78, p. 457, below, and compare Transfer of Property Act IV of 1882, s. 54 (definition of “sale”) and s. 118 (definition of “exchange”). There must be saleable property to be transferred in exchange for the price. Accordingly money cannot be the price of money.

The change of a Government currency note for money is not a contract of sale, for it amounts to an exchange of money in one form for money in another form. “Either form being legal tender, it is impossible to say that one is the price of the other” (*x*). Foreign money or currency, and coins of denominations or issues formerly current in the jurisdiction, but no longer so, are, of course, chattels which can be bought and sold; and where foreign money is taken in exchange for any other kind of chattel (unless it has been made legal tender, and perhaps unless it is current by custom at a settled rate) the transaction is not sale, but barter.

(*t*) *Harrison v. Lube* (1845) 14 M. & W. 139.

(*u*) *Aldridge v. Johnson* (1857) 7 E. & B. 385; 110 R. R. 875; *Sheldon v. Cox* (1824) 3 B. & C. 420.

(*v*) *South Australian Insurance Co. v. Randell* (1869) L. R. 3 P. C. 101.

(*w*) *Volkart Brothers v. Vettivelu*

Nadan (1887) 11 Mad. 450, 467; *Queen Empress v. Appavu* (1885) 9 Mad. 141.

(*x*) *Empress v. Joggesur Mochi* (1878) 3 Cal. 379; *Maithra Dass v. Ramanand* (1878) Punj. Rec. no. 73; *Kanshi Ram v. Secretary of State for India* (1890) Punj. Rec. no. 83; *Dasaundi v. Imam-ud-Din* (1905) Punj. Rec. no. 18.

8. 77. There must be a complete change of property to constitute a sale. In the case of a member of an ordinary club paying for a meal at the club, or even for provisions which he may carry away, there is no sale; the transaction is a release of the joint interest of the other members of the club, and the only contract involved is the contract, made once for all by the member on his admission, to use the property of the club only on the conditions laid down or authorised in its rules and usages (y). "There may be a contract of sale between one part owner and another (z), but members of a club or voluntary society are undivided joint owners, not part owners.

Contract of sale distinguished from contract for work.—Many difficulties have arisen in England and in other common law jurisdictions as to the effect of a contract to make a chattel and deliver it when made. These difficulties were partly due to the old system of pleading, under which a plaintiff might lose his cause if he sued, say, for work and labour, when it should have been for goods bargained and sold, or goods sold and delivered, and partly to the requirements of the 17th section of the Statute of Frauds (a), whereby one of certain special kinds of proof was (and in many jurisdictions still is) necessary to establish a right of action on the contract for the sale of goods above a certain value. Such points cannot arise here in the same manner, but the decisions are still instructive on the principles involved.

Generally a contract to make a chattel and deliver it when made includes a contract of sale, but not always. The test would seem to be whether the thing to be delivered has any individual existence, before delivery, as the sole property of the party who is to deliver it. Examples are perhaps best given in the regular form of illustrations.

(1) A. promises to make a set of false teeth for B. with materials wholly found by A., and B. promises to pay for them when made is a contract for the sale of goods (b).

(2) A. promises to paint a picture for B., A. finding the paint and canvas, which are of small value, and B. promises to pay for the

(y) *Graff v. Evans* (1882) 8 Q. B. D. 373; *Davies v. Burnett* [1902] 1 K. B. 666. the Sale of Goods Act, which see in Appendix. No such provision is now in force in British India.

(a) Sale of Goods Act, s. 1, sub-s. 1. (b) *Lee v. Griffin* (1861) 1 B. & S.

(a) Re-enacted in England in s. 4 of 272; 124 R. R. 553.

picture as a work of art. This is a contract for the sale of goods (c). Whether it is so if the picture is a portrait of B. or a member of B.'s family, and there is an express or tacit understanding by A. not to sell the portrait, or a replica thereof, to any other person, *quære*. No judicial observation on this case has been found.

(3) A. promises to carve a block of marble belonging to B. into a statue. This is not a contract of sale, however much the value of the marble may be increased by A.'s work.

(4) A. promises to print and deliver to B. 500 copies of a manuscript which B. entrusts to him for that purpose, on paper and with ink furnished by A. This is a contract for work and not for the sale of goods (d). So it is, more obviously, where a tailor makes up a customer's cloth and adds trimmings, buttons, and the like from his own stock.

(5) A. is employed by B. to draw a conveyance on paper and with ink furnished by A. This is a contract for work and not for the sale of goods (e).

It will be observed that in the cases where there is no sale there is never a moment when the thing produced is, as a whole, the maker's absolute property, notwithstanding that part or even the whole of the materials may have been his property, whereas, in the other case, he might, if he found it possible and profitable, and if not restrained by patent, copyright, or any other similar branch of law, make in duplicate, or in greater numbers, chattels of the kind ordered, appropriate one at his will to fulfil the special contract, and sell the others to other persons (f). It may seem improbable that some things made to order should be saleable to any other purchaser, or at any rate should fetch a substantial price in the market; but that does not affect the law. Common experience, moreover, shows that there are dealers who offer to buy almost anything, as, for example, old artificial teeth.

But although the contract may be a contract to do work and not an order for a specific article, yet the property in the article produced may pass to the party giving the order. It has been decided that, upon an

(c) Per Blackburn, J., in *Lee v. Griffin*.

(d) *Clay v. Yates* (1856) 1 H. & N. 73.

(e) Per Blackburn, J., in *Lee v. Griffin*.

(f) The remarks of Lord Penzance in *Dixon v. London Small Arms Co.* (1876)

1 App. Ca. at p. 653, though not precisely in point, seem to bear out this view.

8. 77. architect being employed to carry out alterations in a building and preparing plans for this purpose, the property in those plans passes on payment of this remuneration provided under the contract (g).

Different opinions are held in several American jurisdictions, of which an account may be found in Benjamin's treatise ; but they are of no practical importance in India.

It has also been held that where the supposed vendor's labour and skill are really the principal object of the contract, as where he was employed not only to make, but to invent, a machine for a specified purpose, he can at all events recover the value of his work and materials, independently of the question whether there was a contract of sale or not (h) ; but this seems of little importance in jurisdictions where the old forms of action are abolished or have never existed.

Sale or bailment.—In some cases there may be doubt at first sight whether there is a sale of goods (or, if the equivalent is not in money, barter) or a bailment. Here the test is whether the party delivering the goods is entitled to the specific return of what he has delivered. If not, there is no bailment, although the party may be entitled to claim goods of like amount and quality, or goods or money at his election, for example, where wheat of several owners is delivered to a miller, who may grind and sell it, the parties describing the transaction as "storage" (i).

Sale or hire.—An agreement by which the hirer of a sewing machine agrees to pay regularly a fixed monthly rent for the machine, and which provides that the hirer may at any time during the hire become the purchaser of this machine by payment in cash of the price mentioned in the agreement, provided the payments of hire are regularly and duly made, is an agreement for hire, and it does not become one for purchase until the specified conditions are fulfilled (j).

Sale or agency.—A question may arise whether a consignee of goods is the consignor's agent to sell the goods or a buyer of the goods from him. Every case must depend on its own facts, and the facts of a "sale or return" business (as to which see more under s. 78) may be very

(g) *Gibbon v. Pease* [1905] 1 K. B. 810.

(i) *South Australian Insurance Co. v. Randell* (1869) L. R. 3 P. C. 101.

(h) *Grafton v. Armitage* (1845) 2 C. B. 338.

(j) *Gopal Tukaram v. Sorabji Nusserwanji* (1904) 6 Bom. L. R. 371.

near those of a *del credere* agency. The words used by the parties are not conclusive. Thus there are trades in which the so-called agent is well known to be a retailer. If a consignee is bound to account to the consignor for goods sold at a fixed rate and within a fixed time, but may dispose of them on any terms he chooses to make, calling him an agent will not make him so, he is a buyer (*k*). On the other hand, one who guarantees payment of the price for goods disposed of by him is an agent; for if he were a buyer he would be directly liable for the price, and a man cannot guarantee his own debt. (*l*). Ss. 77,

A contract of sale is compatible with a distinct collateral contract between the same parties as to the buyer's subsequent use or disposal of the thing sold (*m*).

78.—Sale is effected by offer and acceptance of ascertained goods for a price,
Sale how effected.

or of a price for ascertained goods,
together with payment of the price or delivery of the goods; or with tender, part-payment, earnest or part-delivery; or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the price or when the earnest is paid or when the whole or part of the goods is delivered.

If the parties agree, expressly or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

Illustrations.

(a) B., offers to buy A.'s horse for 500 rupees. A. accepts B.'s offer, and delivers the horse to B. The horse becomes B.'s property on delivery.

(b) A. sends goods to B., with the request that he will buy them at a stated price if he approves of them, or return them if he does not approve of them. B. retains the goods, and informs A. that he approves of them. The goods become B.'s when B. retains them.

(*k*) *Ex parte White* (1871) L. R. 6 Div. 566.
Ch. 397, especially the judgment of (*m*) *McBain v. Wallace* (1881) 6 App. Mellish, L.J. Ca. 588.
(*l*) *Ex parte Bright* (1879) 10 Ch.

B. 78.

(c) B. offers A., for his horse, 1,000 rupees, the horse to be delivered to B. on a stated day, and the price to be paid on another stated day. A. accepts the offer. The horse becomes B.'s as soon as the proposal is accepted.

(d) B. offers A., for his horse, 1,000 rupees on a month's credit. A. accepts the offer. The horse becomes B.'s as soon as the offer is accepted.

(e) B., on the 1st January, offers to A., for a quantity of rice, 2,000 rupees, to be paid on the 1st March following, the rice not to be taken away till paid for. A. accepts the offer. The rice becomes B.'s as soon as the offer is accepted.

History of the law.—This section is intended to represent, and may be taken as representing, the modern Common Law, though the wording of the last paragraph does not fully show how readily an agreement to give credit is inferred. In fact, the law has gone through several stages. The rule of early Germanic law, followed in England till the fifteenth or late fourteenth century, was that nothing short of actual delivery would pass property, whether the transaction were gift, barter, or sale (*n*). But in the fourteenth century it was established that a buyer who had given security by deed for payment of the price acquired the right to immediate possession, a right which he might enforce either by action or by taking the goods peaceably if he could; and in the fifteenth century this was extended to the case of an informal bargain (*o*). As the immediate right to possess a thing was constantly spoken of as "property," it is not difficult to understand how the rule that the contract itself passes the property came to be accepted. Down to the early part of the seventeenth century it was thought that an agreement to give credit must be express; but, as Lord Blackburn wrote more than seventy years ago, "in modern times (at least in commercial transactions) the parties are taken to contemplate an immediate transfer of the property in the goods and an immediate obligation to pay the price, with a reasonable time for

(n) Bracton, fo. 61 h.

(o) Ames in Harv. Law Rev. viii. 259; repr. Essays in Anglo-American Legal History, iii. 312. Thus the truth lies between Serjeant Manning, who suggested that the Common Law rule was due to comparatively recent misunderstanding, and Lord Blackburn, who proved against Manning that it

was recognised in the fifteenth century, and inferred that it had "existed since English law begun": Blackburn on Sale, ed. Graham, 261 sqq. The treatment of this point in *Cochrane v. Moore* (1890) 25 Q. B. Div. at p. 71, where the question before the Court was of the effect of a *gift* without delivery, is not adequate.

delivery and payment, unless there is something to show a different intention " (p). This is the rule in the only shape which now has to be considered for any practical purpose. A similar rule, notwithstanding that the Roman law is otherwise, has been adopted for not only moveable, but immovable, property in France and in those jurisdictions (including, among British possessions, the Province of Quebec and Mauritius) where the modern French codes have been introduced or imitated. Contracts for the sale of immovable property, however, are guarded by requirements of form (q). S. 78.

The following observations of Parke, B., are classical, though now elementary :—

"I take it to be clear that by the law of England the sale of a specific chattel passes the property in it to the vendee without delivery. The general doctrine that the property in chattels passes by a contract of sale to a vendee without delivery is questioned in *Bailey v. Culcerwell* (r) in a note by the reporters ; but I apprehend the rule is correct as confined to a bargain for a specific chattel. Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained ; but where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee " (s).

(p) Blackburn on Sale, ed. Graham, p. 172 (p. 149 of original edition). I purposely avoid the questions raised in the Common Law by a gift of chattels without delivery, as they are outside the present undertaking and by n means free from difficulty.

(q) Hence particular rules as to specific performance are not needed in modern French law, for the purchaser has by force of the contract itself all

the rights and remedies of an owner. This has been overlooked by one or two learned English writers.

(r) 2 Man. & Ry. 566 (by Serjoant Manning); see Com. Dig. Biens, D. 3. See note (o) above.

(s) *Dixon v. Yates* (1833) 5 B. & Ad. at p. 340; 39 R. R. at pp. 497, 498, cited by Willes, J., in *Godts v. Rose*, s. 90, Illustration (f), p. 491 below.

- §. 78. The corresponding matter in the English Sale of Goods Act (ss. 16 sqq.) is quite differently arranged, and minute comparison would not be profitable.

Delivery.—As to what amounts to delivery, see ss. 90-92, pp. 490-498, below. In the present section the words “when the whole or part of the goods is delivered” must be read with s. 92, and mean “when part is delivered in progress of the delivery of the whole” (t). Thus where the defendant agreed to purchase from the plaintiff five bales of chrome orange twiet, “or any part thereof that may be in a mercantile condition, ex *City of Cambridge*, or other vessel or vessels,” with specific marks and numbers, each bale containing 500 pounds, at so much per pound, to be paid for on or before delivery, it was held that payment for, and delivery of, one bale did not amount to a delivery of part within the meaning of this section so as to pass to the defendant the property in the remaining four bales (u).

As to the transfer of ownership in shares in companies, see Indian Companies Act VI of 1882; as to negotiable instruments, see Act XXVI of 1881.

When property passees where the goods are ascertained.—Where the defendant agreed to sell paddy to the plaintiff on the terms that the plaintiff should pay 1,000 rupees in advance, and the balance of the price on delivery, and it was agreed that an assignment of a debt for 100 rupees and a hoondi for 900 rupees should be accepted as payment of the advance, it was held by the High Court of Madras that the property in the goods passed to the plaintiff on assignment of the debt and delivery of the hoondi by the plaintiff to the defendant, and the plaintiff was entitled to damages for the wrongful sale of the paddy to a third person (v).

If the parties to a contract for the sale of ascertained goods agree that the payment for and delivery of the goods are to be postponed, the property in the goods passes to the buyer as soon as the proposal for sale is accepted. Such passing of property, it has been said, cannot be

(t) *Mitchell Reid & Co. v. Buldeo Dass* (1887) 15 Cal. 1, 6. (v) *Kuttayan Chetty v. Palaniappa Chetty* (1904) 27 Mad. 540.

(u) *Ibid.*

postponed by any agreement between the parties. "If you find in a contract certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue" (*w*). But this seems an extreme and unnecessary view. S. 78.

Evidence.—A. agrees to buy from B. a full cargo of kerosine oil which B. had contracted to buy from C. Subsequently A. and B. request C. to transfer C.'s contract with B. into A.'s name. C. refuses to consent to the transfer, and it is thereupon arranged between A. and B. that bought and sold notes should be exchanged. Seeing that the market was rising, B. inserts in the bought and sold notes the figures 100,000 cases, as descriptive of the quantity of oil sold, whereas the truth was that the cargo amounted to 125,000 cases. The bought and sold notes having been falsified, A. is entitled to disregard them and prove his contract by other and antecedent material (*r*).

Illustration (b)—Sale or return.—Among the illustrations to this section the only one not too elementary for comment is (b). A delivery of goods on approval, or what is called sale or return, might have been held to pass the property subject to a condition that it should revest in the former owner if the optional buyer returned the goods within the prescribed time, or, in the absence of any stated term, a reasonable time. But the accepted rule is that in such a case there is generally no complete sale until the buyer has either

(a) signified his approval, which may be either expressly or by dealing with the goods as owner (*y*); or

(b) kept the goods until the lapse of the prescribed or a reasonable time without returning them; or

(c) made return impossible by his own act or default, as by letting the goods be destroyed or spoilt (*z*).

(*w*) Maclean, C.J., in *Brij Coomaree v. Salamander Fire Insurance Co.* (1905) 32 Cal. 816, at p. 823. The other members of the Court preferred to say that no contrary intention was manifest.

(*x*) *Durga Prosad Sureka v. Bhajan Lal Lohea* (1904) 31 Cal. 614; L. R. 31 Ind. Ap. 122.

(*y*) As to pledging them: *Kirkham v. Attenborough* [1897] 1 Q. B. 201, C. A. "Any act which is consistent only with

his being the purchaser" has the same effect: per Lord Esher, M.R., at p. 203. The verbal criticism of the Sale of Goods Act does not call for notice here.

(*z*) Authorities are considered in *Ray v. Barker* (1879) 4 Ex. Div. 279; *Elphick v. Barnes* (1880) 5 C. P. D. 321; *Chapman v. Withers* (1888) 20 Q. B. D. 824; *Weiner v. Gill* [1906] 2 K. B. 574.

8. 78. Accordingly it is at the original owner's risk if the subject-matter perishes by inevitable accident—*e.g.*, a horse delivered on sale or return dies—before the expiration of the time allowed for return (a), unless the accident is due to a defect for which the provisional purchaser is answerable by the special contract or otherwise. Fraud of a third person to whom the goods are entrusted by the provisional purchaser reasonably and for a proper purpose, and who, for example, sells or pledges them as his own, has the effect, in the absence of special agreement, of passing the property, if by reason of the fraud of the third person the provisional purchaser is unable to return them (b). Intervening damage which only depreciates the goods without the bolder's fault, such as an accident to a horse while being tried, does not generally affect the right to return them (c). The cases have not been lately considered as a whole, and are not altogether easy to reconcile; but the present statement of their actual effect is believed to be correct.

Where it is the notorious custom of a particular trade for dealers to hold goods on sale or return, a person so holding anything in the way of that trade is not a reputed owner under the English bankruptcy law; nor does he become so by selling or endeavouring to sell the goods, that being the purpose for which he holds them. In deciding this, the late Sir G. Jessel incidentally stated the legal effect of the transaction (d):—

“He [a man who has goods sent to him on sale or return] receives the goods from the true owner with an option of becoming the owner, which can be exercised in one of three ways: by buying the goods at the price named by the vendor; by selling [or pledging (e)] the goods to some one else, which is taken to be a declaration of his option; or by keeping them so long that it would be unreasonable that he should return them.”

(a) *Elphick v. Barnes*, last note.

(b) Some dicta of Cotton, L.J., in *Ray v. Barker* (note (2)) indicate a different opinion. The dicta of Bramwell and Brett, L.JJ., are strongly in the other direction. The case is really a decision on a technical point of procedure and so cannot be considered as affecting the authority of *Elphick v.*

Barnes, which is a considered decision of Denman, J.

(c) *Head v. Tattersall* (1871) L. R. 7 Ex. 7.

(d) *Ex parte Wingfield* (1879) 10 Ch. D. 591; see per Jessel, M.R., at p. 593.

(e) *Kirkham v. Attenborough*, note (y), p. 461, above.

It must be remembered that all rules of this kind are subject to the intention of the parties, who may vary the ordinary terms of sale or return, or add special conditions or warranties. Express terms, if any there be, must be carefully considered in every case. If the parties express in terms their intention as to when the property is to pass, the Court will construe the contract according to such intention. Where the plaintiff delivered goods on sale or return with a memorandum in writing that they were to remain his property "until settled for or charged," and the goods were pawned with the defendants by a fraudulent person, who had obtained possession from the provisional purchaser, and there was no settlement with or charge by the plaintiff, it was held that the property had not passed from the plaintiff (*f*). It is not always easy to distinguish the transaction of sale or return from a conditional sale, in which the property passes at once, but subject to the buyer's option to return the goods if some prescribed condition is not fulfilled. The analogy, however, is sufficient to make such cases of conditional sale instructive and to some extent applicable in cases of sale or return. Indeed, it may be unnecessary to decide to which class a given case belongs (*g*).

Earnest.—With regard to giving of earnest, attention may be called to the learned judgment of Sir Edward Fry, then a Lord Justice of Appeal, in *Howe v. Smith* (*h*). He says :—

"The practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring (*i*), or other object, to be repaid or redelivered on the completion of the contract,

(*f*) *Weiner v. Gill* [1905] 2 K. B. 172; [1906] 2 K. B. 571. In *Weiner v. Harris* [1910] 1 K. B. 285, C. A., a transaction called sale or return was held on the whole to amount to an agency for sale giving the holder of the goods the authority of a mercantile agent under the (English) Factors Act, 1889.

(*g*) *Head v. Tattersall* (note (*c*)) and *Chapman v. Withers* (note (*z*)), above, seem to be really examples of conditional sale. Sir M. Chalmers (On the Sale of Goods Act, p. 48) appears to take the same view. The learned

editors of Benjamin on Sale treat them as cases of sale or return, but this makes it very difficult to classify the so-called warranty.

(*h*) (1884) 27 Ch. Div. 89, 101.

(*i*) The European wedding ring was originally given as a pledge on betrothal, *arrarum nomine datus* in mediæval Latin. The modern engagement ring thus represents the more ancient custom. The Latin word *arrha* is represented by the old northern English *arles*, of which *earnest* may be a variant form, but this is uncertain. See the words in the Oxford English Dictionary.

8. 78. appears to be one of great antiquity and very general prevalence. It was familiar to the law of Rome (where the rule was that a defaulting buyer forfeited the earnest-money, and a defaulting seller was bound to restore it twofold). That earnest and part payment are two distinct things is apparent from the 17th section of the Statute of Frauds, which deals with them as separate acts, each of which is sufficient to give validity to a part contract" (j).

There is, however, nothing to prevent the same payment from being both earnest and part payment if such is the intention; and this is, in fact, under the conditions in common use in England, the character of the deposit on a sale of land. "The deposit serves two purposes: if the purchase is carried out, it goes against the purchase-money; but its primary purpose is this, it is a guarantee that the purchaser means business" (k).

Earnest, whether given in money or not, must be something of value really given by the buyer and kept by the seller; a mere symbolic ceremony such as one party drawing a coin across the other's hand will not do (l). This seems, indeed, plain enough without authority.

When a deposit in the nature of earnest is paid on a contract for the sale of immovable property in British India, a vendor by whose default the sale goes off must return the sum so paid (m), but if the default is the purchaser's, the purchaser must lose it (n). S. 74 does not apply to such a deposit, and a stipulation for its forfeiture in case of breach is not one by way of penalty (o). But if on breach of the agreement by the purchaser the vendor resells the property, and sues to recover the loss arising on such resale, the deposit, although forfeited, is to be taken

(j) The distinction between earnest and part payment is preserved in s. 4 (1) of the Sale of Goods Act, 1893, which has superseded the 17th section of the Statute of Frauds.

(k) Lord Macnaghten in *Soper v. Arnold* (1889) 14 App. Ca. 429, 435.

(l) *Blenkinsop v. Clayton* (1817) 7 Taunt. 597; 18 R. R. 602.

(m) *Ibrahimhai v. Fletcher* (1896) 21 Bom. 827, 853; *Alokeshi Dassi v. Hara Chand Dass* (1897) 24 Cal. 897.

(n) *Bishan Chand v. Radha Kishan Das* (1897) 19 All. 489; *Roshan Lal v. The Delhi Cotton Co., Ltd.* (1910) 33 All. 166; also *Natesa Aiyar v. Appavu* (1913) 38 Mad. 178. See also *Municipal Board of Allahabad v. Tikandar Jang* (1916) 38 All. 52, which turned upon the construction of the conditions of sale.

(o) *Natesa Aiyar v. Appavu* (1913) 38 Mad. 178; *Veerayya v. Sivayya* (1914) 27 Mad. L. J. 482.

into account as diminishing the deficiency (p). See notes below to **ss. 78, 79** s. 18, cl. (d), of the Specific Relief Act. The rule is no doubt the same for goods.

79.—Where there is a contract for the sale of a thing which has yet to be ascertained, made or finished, the ownership of the thing is not transferred to the buyer, until it is ascertained, made or finished.

Transfer of ownership of thing sold which has yet to be ascertained, made or finished.

Illustration.

B. orders A., a barge-builder, to make him a barge. The price is not made payable by instalments. While the barge is building, B. pays to A. money from time to time on account of the price. The ownership of the barge does not pass to B. until it is finished [*Laidler v. Burlinson* (see note (a), p. 468, below)].

Transfer of ownership, 1st case.—Accidental destruction or loss of the goods may raise the question when ownership was transferred even as between solvent parties, and in a jurisdiction free from the complications introduced by the Statute of Frauds. In case of insolvency it is extremely important to know when the goods which are the subject of a contract of sale have ceased to be liable to satisfy the seller's creditors or, as the case may be, have become liable to satisfy the buyer's.

The present section appears, for some reason which is not obvious, to overlap the matter of the four following sections. Lord Blackburn incidentally stated the principles of English law as follows in deciding on an appeal from Scotland:—

“A contract for a valuable consideration, by which it is agreed that the property in a specific ascertained article shall pass from one to another, is effectual according to the law of England to change the property. It may be that the party who has sold the article is entitled to retain possession till the price is paid, if that was by the contract to precede delivery, but still the property is changed.

(p) *Ockenden v. Henly* (1858) 1 E. B. 1 Ch. 176; *Vellore Taluk Board v. A. E. 485*; *Shuttleworth v. Claws* [1910] *Gopalasami* (1913) 38 Mad. 801.

§. 79. "It is essential that the article should be specific and ascertained in a manner binding on both parties, for unless that be so it cannot be construed as a contract to pass the property in that article. And in general, if there are things remaining to be done by the seller to the article before it is in the state in which it is to be finally delivered to the purchaser, the contract will not be construed to be one to pass the property till those things are done.

"But it is competent to parties to agree for valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has attained a certain stage: though if it is part of the bargain that more work shall be done on the article after it has reached that stage, it affords a strong *prima facie* presumption against its being the intention of the parties that the property should then pass. . . . It is, I think, a question of the construction of the contract in each case, at what stage the property shall pass; and a question of fact in each case whether that stage has been reached" (q).

In the earliest English case usually cited on the point, the rule as to goods made to order was thus laid down:—

"Where goods are ordered to be made, while they are in progress the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered" (r).

Goods applicable to the performance of a contract are not the same thing in law as goods actually appropriated to the contract, as the common phrase is. Some particular goods must be specified, by the consent express or tacit of the parties, as the very goods contracted for (s).

Unfinished ships, etc.—Further illustrations will occur under the following sections, but the one illustration to this section

(q) *Seath v. Moore* (1886) 11 App. Ca. 350, 370.

(r) *Atkinson v. Bell* (1828) 8 B. & C. 277, 282; 32 R. B. at p. 386, per Bayley. J.

(s) *Cp. Gabarron v. Kreeft* (1875) L. R. 10 Ex. 274, a case where the Court, agreeing on the principle, was divided on its application to the facts.

calls for rather special attention. It is mentioned that the price of the barge is not made payable by instalments, suggesting that, if it had been, the result might be different. In fact, where the price of a ship in course of construction is payable by instalments, a special rule is established by the English authorities, namely, that property in the unfinished ship passes on payment of the first instalment, and subsequent additions become the buyer's property as they are worked into the ship, subject, as in all these cases, to evidence of a contrary intention (t). The payment of instalments is held "to appropriate specifically to the buyer the very ship so in progress, and to vest in him a property in that ship." The result is that, "as between him and the builder, he is entitled to insist upon the completion of that very ship, and . . . the builder is not entitled to require him to accept any other" (u); and this has long been taken as a settled rule (v). Contrary to an opinion formerly held, it does not extend to make accessories intended to belong to the ship, but not forming part of the structure, become the buyer's property, nor even parts of the structure, such as the engines, before they are fitted in the vessel and approved as parcel of it (w).

Where the purchaser has paid part of the instalments by accepting bills drawn by the vendor, which have been discounted with third parties, and the purchaser and vendor subsequently become bankrupt, the holders of the bills have no lien on the ship if the bills are dishonoured (x).

The principle is not confined to ships. It seems that "the same reasoning would apply to any other chattel as to which the parties should agree that the property should pass while the chattel was in an incomplete state" (y). There may be a contract for the sale of the

(t) That there is no rule of law in the matter, but only a rule of construction, is settled by *Clarke v. Spence* (1836) 4 Ad. & E. 448; 43 R. R. 395; and see *Laing v. Barclay, Curle & Co.* [1908] A. C. 35.

(u) *Woods v. Russell* (1822) 5 B. & Ald. 942, 946; 24 R. R. 621, 624.

(v) Mellish, L.J., in *Ex parte Lambton* (1875) L. R. 10 Ch. 405, 414.

(w) *Wood v. Bell* (1856) 6 E. & B. 355; *Seath v. Moore* (1886) 11 App. Ca. 350, 381, 385; *Reid v. Macbeth & Gray* (an appeal from Scotland) [1904] A. C. 223.

(x) *Ex parte Lambton* (1875) L. R. 10 Ch. 405.

(y) *Seath v. Moore*, 11 App. Ca. at p. 385, per Lord Bramwell.

S. 79. component parts of a whole structure or the like as parts, coupled with a contract that the seller shall put them together after delivery to the buyer. Here the parts as delivered are appropriated to the contract and become the buyer's property (2). Contracts for the building of ships, however, stand on a special footing, in that if the ship is to be paid for by instalments and there is no express provision as to when the property is to pass, the Court will infer, from the fact of payment being made by instalments that the property in the portion completed is intended to pass to the purchaser as the payments are made (a). Of course the goods in question must be shown by sufficient evidence to be appropriated to the contract. Being worked into the body of a ship in construction is evidence of appropriation. Other kinds of acceptance may be. The mere fact of being fitted and intended by the maker to form part of a particular ship, and destined for a certain place in the structure, but not yet in that place, is not sufficient (b). It is not indispensable, in order to maintain this inference, that there shall have been in the original contract a stipulation for payment of an instalment, or that the instalment has actually been paid. The absence of these considerations might be supplied by other circumstances from which the inference could be drawn. There must, however, always be facts admitted or proved sufficient to warrant the inference that the purchaser has agreed to accept the completed portion of the ship in part fulfilment of the contract of sale (c).

The governing consideration is, What did the parties intend? And if there is a condition that the ship is not to be considered accepted until she has passed satisfactory steam trials, the property will not pass until that condition has been fulfilled (d). This presumption or inference will not arise in the case of machinery or materials to be fitted to a ship which is already in existence (e).

(c) *Pritchett & Gold & Co. v. M. & W.* 602; 46 R. R. 717; *Seath v. Moore*, 11 App. Ca. at p. 380.

(a) *Ex parte Lambton*, L. R. 10 Ch. at p. 414; *Seath v. Moore*, 11 App. Ca. at p. 380.

(d) *Laing v. Barclay, Curle & Co.* [1908] A. C. 35.

(b) *Reid v. Macbeth & Gray* [1904] A. C. 223.

(e) *Anglo-Egyptian Navigation Co. v. Bennie*, L. R. 10 C. P. at pp. 280, 281.

(c) *Laidler v. Burlinson* (1837) 2

The language of the Act has some appearance of laying down fixed rules of law not capable of being displaced even by evidence of a contrary intention ; whereas the object of the English rules is only to assist in ascertaining the intention of the parties. But s. 78 seems really to involve recognition of the English principle. Ss. 79, 81.

80.—Where, by a contract for the sale of goods, the seller is to do anything to them for the purpose of putting them into a state in which the buyer is to take them, the sale is not complete until such thing has been done.

Completion of sale of goods which the seller is to put into state in which buyer is to take them.

Illustration.

A., a shipbuilder, contracts to sell to B. for a stated price a vessel which is lying in A.'s yard ; the vessel to be rigged and fitted for a voyage, and the price to be paid on delivery. Under the contract, the property in the vessel does not pass to B. until the vessel has been rigged, fitted up, and delivered.

Transfer of ownership, 2nd class.—The rules laid down in this and the next section are, as Lord Blackburn pointed out long ago, not older than the nineteenth century ; but they are so well settled that the authority of Lord Blackburn's own statement is really sufficient. As regards the matter of this section,

“ Where, by the agreement, the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of property. . . . In general, it is for the benefit of the vendor that the property should pass ; the risk of loss is thereby transferred to the purchaser ” s. 86, below), “ and as the vendor may still retain possession of the goods, so as to retain a security for payment of the price, the transference of the property is to the vendor pure gain. It is, therefore, reasonable that, where by the agreement the vendor is to do something before he can call upon the purchaser to accept the goods as corres-

3. 80. ponding to the agreement, the intention of the parties should be taken to be that the vendor was to do this before he obtained the benefit of the transfer of the property" (f).

A few years later the rule was declared by the Judicial Committee of the Privy Council :—

"By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Various circumstances have been treated by our Courts as sufficiently indicating such contrary intention. If it appears that the seller is to do something to the goods sold on his own behalf, the property will not be changed until he has done it or waived his right to do it" (g).

An earlier judicial statement is as follows :—

"Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed" (h).

By the law of England, as it now stands, it is not sufficient that the vendor shall have done what remained to be done on his part, for by s. 18 (2) of the Sale of Goods Act, 1893, the property does not pass until the buyer has notice that the seller has performed his duty in this respect.

This statement sums up the result of cases in which it had been held, as to liquids bought in bulk and to be delivered by the seller in

(f) Blackburn on Sale, ed. Graham, 173, 174.

(g) *Gilmour v. Supple* (1858) 11 Moo. P. C. 551, 566; 117 R. R. 97, 106, a Canadian case of a timber raft broken up by storm at the wharf to which it had been floated down; the timber had already been measured and specified: see and distinguish *Logan v. Le Mesurier* (1847) 6 Moo. P. C. 116; 79 R. R. 10,

a case from Lower Canada (under old French law, but there was stated to be no difference between this and the Common Law for the purpose in hand where the measuring was to be done after arrival, and it was held that neither property nor risk had passed.

(h) Bayley, J., in *Simmons v. Swift* (1826) 5 B. & C. at p. 862; 29 R. R. at p. 440.

casks, that property passed as and when the casks were completely filled up, but the contents of casks not yet filled were the seller's property and at his risk, although the total quantity sold and the price were ascertained, the test for the passing of property being that "nothing remained to be done by the seller in order to complete the sale as between him and the buyer" (i). It is not clear that, when these cases were decided, evidence of contrary intention would have been admitted. But it is now settled in England that the intention of the parties prevails. Property in unfinished goods will pass if the goods are ascertained and pointed out with the intention of transferring ownership (j).

A merely collateral act to be done by the seller with respect to the goods, such as paying warehouse charges (k) or duties (l), will not negative an inference from the other circumstances that the property has passed.

The fact of something remaining to be done by the buyer has never been held to have of itself any effect at all, though Lord Blackburn, writing in 1845, seems to have apprehended, with deprecation, that it might be so held in some cases. See the following section.

Completion of sale of goods when seller has to do anything thereto in order to ascertain price.

81.—Where any thing remains to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the sale is not complete until this has been done.

Illustrations.

(a) A, the owner of a stack of bark, contracts to sell it to B, weigh and deliver it, at 100 rupees per ton. B. agrees to take and pay for it on a certain day. Part is weighed and delivered to B.; the ownership of the residue is not transferred to B. until it has been weighed pursuant to the contract (*Simmons v. Swift* (1826) 5 B. & C. 857; 29 R. R. 438) (m).

(i) *Rugg v. Minett* (1809) 11 East, 210; 10 R. R. 475; *Wallace v. Breeds* (1811) 13 East, 522; 12 R. R. 423.

(j) *Young v. Matthews* (1866) L. R. 2 C. P. 127.

(k) *Hammond v. Anderson* (1804) 1 B. & P. N. R. 69; 8 R. R. 763.

(l) *Hinde v. Whitehouse* (1806) 7 East, 558; 8 R. R. 676.

(m) The earlier case of *Hanson v. Meyer* (1805) 6 East, 614; 8 R. R. 572, did not go quite so far. It decided only that on similar facts (a warehouseman having been ordered by the seller to weigh and deliver to the buyer) the unpaid vendor had at any rate a lien on the part remaining unweighed.

(b) A contracts to sell a heap of clay to B. at a certain price. B. is, by the contract, to load the clay in his own carts, and load at a certain weighing machine, which his carts must pass, from A.'s grounds to B.'s place of deposit. Here nothing more to weigh each done by the seller; the sale is complete, and the ownership of the clay is transferred at once [*Turley v. Bates* (1863) 2 H. & C. 200; *Bates v. Turley* (1863) 2 H. & C. 200]. It was found as a fact that the contract was for the sale of the heap of clay.

Transfer of ownership, 3rd case.—In England the sale is complete even before the price is finally ascertained, if such may be the intention of the parties, and the manner of ascertaining the price by measurement of the goods, is agreed upon. The case in which this was laid down (n) was decided some days after the passing of the Contract Act in India. Cockburn, C.J., stated it to be “perfectly correct, especially after the case of *Turley v. Bates*” (see Illustration (b)), “that the real question in all these cases is whether the parties did intend that the property should pass.” *Quære* whether the words of the present section be not too strong to admit of this doctrine being followed by the Indian Courts; if they are, amendment seems desirable.

The Privy Council of Calcutta has laid down that this section does not exclude the question of intention which, according to *Turley v. Bates*, is the determining factor. It was accordingly held that though nothing remained to be done to the goods by the seller for the purpose of ascertaining the amount of the price, the property did not pass to the buyer, it being the intention of the parties that the sale should not be complete until the goods had been tested, selected and weighed by the buyer (o). Where the plaintiff contracted with the defendant to sell him 975 maunds of rice, being the whole contents of a certain gola, at a certain rate, and the defendant paid certain earnest-money, and agreed to remove the whole of the rice after weighing on or before a certain date, and delivery was taken of a part, it was held that the property in the goods had passed to the defendant. In this case, “so far as the vendors were concerned, nothing remained to be done on their part to the rice sold for the purpose of ascertaining the

(n) *Martineau v. Kitching* (1872) L.R. (1918) 44 Cal. 98. The intention in this case was inferred from the usage of

(o) *Abdul Aziz v. Jogendra Krishna* trade.

amount of the price.' The rice was to be weighed for the satisfaction of the purchasers" (p). This is clearly within the earlier English authorities. Sa. 81-82.

Lord Blackburn commented unfavourably on the rule, as having been "somewhat hastily adopted from the civil law, without advert- ing to the great distinction made by the civilians between a sale for a certain price in money and an exchange for anything else" (q); but that distinction itself appears to be now definitely adopted in English law. Moreover, it was not clear when Lord Blackburn wrote that in England the rule was confined to acts to be done by the seller. The alleged following of Roman law would be more exactly described as a following of the great French jurist Pothier, of which, indeed, Lord Blackburn was quite aware. It cannot be strictly verified, but there is no doubt that in the early part of the nineteenth century, when English authority was still scanty on many parts of commercial law, Pothier was freely used by English lawyers. The matter is now only of historical interest.

82.—Where the goods are not ascertained at the time of making the contract of sale, it is necessary to the completion of the sale that the goods shall be ascertained.

Completion of sale when goods are unascertained at date of contract.

Illustration.

A. agrees to sell to B. 20 tons of oil in A.'s cisterns. A.'s cisterns contain more than 20 tons of oil. No portion of the oil has become the property of B. [*White v. Wilks* (1813) 5 Taunt. 176; 14 R. R. 735 (r)].

83.—Where the goods are not ascertained at the time of making the agreement for sale, but goods answering the description in the agreement are subsequently appropriated by one party, for the purpose of the agreement, and that appropriation is

Ascertainment of goods by subsequent appropriation.

(p) *Shoshi Mohun Pal v. Nobo Kristo* (1878) 4 Cal. 801.

(q) Blackburn on Sale, 153.

(r) It would be useless to discuss in India how, if at all, the earlier case of *Whitehouse v. Frost* ((1810) 12 East 614; 11 R. R. 491, and see the Preface, to that volume) can be reconciled with

the current of authority. Sir M. Chalmers takes no notice of it. The reasons given for the decision seem to mis- apply the doctrine of constructive de- livery. Lord Atkinson cited *Whitehouse v. Frost* in *Dublin City Distillery v. Doherty* [1914] A. C. at p. 845, but with- out noting the difficulty

1. 83. assented to by the other, the goods have been ascertained, and the sale is complete.

Illustration.

A., having a quantity of sugar in bulk more than sufficient to fill 20 hogsheads, contracts to sell B. 20 hogsheads of it. After the contract A. fills 20 hogsheads with the sugar, and gives notice to B. that the hogsheads are ready, and requires him to take them away. B. says he will take them as soon as he can. By this appropriation by A., and assent by B., the sugar becomes the property of B. [*Rohde v. Thwaites* (1827) 6 B. & C. 388; 30 R. R. 363, with slight simplification of the facts].

Ascertainment of goods by subsequent appropriation.—The following cases may be stated in the form of additional illustrations :—

(1) A. contracts with B. to sell him all the oil to be produced from the year's crop of peppermint on A.'s farm. When the crop is got in, and the oil made, A. puts the oil into bottles furnished by B. By this appropriation the oil becomes the property of B. : *Langton v. Higgins* (1859) 4 H. & N. 402 ; 118 R. R. 515.

(2) A. contracts to sell B. 200 maunds of grain out of a greater bulk which B. has seen and approved, and it is agreed that B. shall send his own sacks to be filled. B. sends a sufficient number of sacks, and 150 maunds of the grain are put into B.'s sacks by A.'s servants and made ready for despatch. Afterwards A. countermands his orders for sending the filled sacks to B., and causes the grain in them to be turned out and mixed with the bulk. The grain put in the sacks became B.'s property as each sack was filled, and did not cease to be so by A.'s subsequent wrongful dealing with it : *Aldridge v. Johnson* (1857) 7 E. & B. 885 ; 110 R. R. 875.

(3) B. sends an order from Madras to A., a manufacturer at Calcutta, for certain goods " to be despatched on insurance being effected." A. packs goods according to the order in a cask marked with B.'s initials, and ships it from Calcutta to B., having insured the goods in B.'s name. The goods become B.'s property as soon as they are despatched from Calcutta : *Fragano v. Long* (1825) 4 B. & C. 219 ; 28 R. R. 226.

(4) A. contracts to sell to B. 100 maunds of grain, according to a sample produced, out of a larger bulk which B. has not seen, and which is already in sacks of A.'s. A. marks a certain number of these sacks

with B.'s name and the words "To wait orders." The sacks so dealt with do not become B.'s property in the absence of specific assent from B., or previous authority from B. to A. to select them on B.'s behalf: *Jenner v. Smith* (1869) L. R. 4 C. P. 270.

(5) Goods answering the description in a contract were manufactured by the vendor and by him appropriated to the contract, and the purchaser on being informed of it directed the vendor to mark and despatch them for shipment according to certain instructions and the goods were marked and despatched from the vendor's mill, but could not be shipped, as the vessels named by the purchaser were not available at their usual place:—*Held* that the property in the goods passed to the purchaser, and he was liable in damages for declining to take delivery of the goods. "The act of despatching the goods from the mill was the act of the defendant (i.e., the purchaser) through his agents, the plaintiffs, and this act of the defendant constituted an implied assent to the appropriation by the plaintiffs, which then became no longer revocable": *Cliver Jute Mills Co. v. Ebrahim Arab* (1897) 24 Cal. 177, 182. The conduct of the purchaser in directing the vendor to mark and despatch the goods for shipment shows that he assented to the appropriation which the vendor had made. The conduct of the vendor in marking and despatching them was a complete compliance with the directions of the purchaser, who had not instructed him to ship the goods, but only to despatch them for shipment. Hence the case is easily distinguishable from *Jenner v. Smith* (last page), where the purchaser gave no instructions to the vendor and never signified his assent to such appropriation as had been made. There the appropriation was clearly only conditional on the purchaser giving the necessary orders (s).

(6) A. contracts to sell to B. 1,000 bales of jute, the goods to be placed alongside s.s. *Uganda*, and to be paid for in cash against the mate's receipts. The goods are marked by A. with B.'s private mark pursuant to B.'s instructions, and they are placed alongside the vessel;

(s) If a purchaser without inspection *Buchanan v. Ardall* (1875) 15 B. L. R. takes possession of the goods, or exercises proprietary rights over them, he 276, 283, 291—293. There is nothing in this, of course, beyond the English thereby gives his implied assent to the authorities. appropriation effected by the seller. See

S. 83. and shipped in due course. The mate's receipts are made out in B.'s name, and A. sends them on to B., together with his bill for the price. B., without paying for the goods, exchanges the receipts for bills of lading, and pledges them with C., who advances money in good faith. B. becomes insolvent. A. sues C. for the price of the goods, alleging that the property in the goods did not pass to B., and B. therefore could not make a valid pledge thereof:—*Held*, that the property in the goods passed to B., the above facts affording sufficient evidence of an appropriation by A. of the goods to the contract, and of B.'s assent to the appropriation. *Held*, further, that a clause in the contract, that if B. retained the mate's receipts without paying for the goods the receipts should be deemed to be the property of A. until B. paid for the goods, did not render the appropriation conditional only. The effect of that clause was, it was said, not to reserve the *jus disponendi* in A., but to provide him with a security for due payment of the price of the goods by empowering him to hold possession of the mate's receipts, and so to prevent B. from dealing with the goods until the price was paid: *Juggernath Angurwallah v. Smith* (1906) 33 Cal. 547.

Delivery of goods to carrier.—An important point in this connection is that, where goods are delivered to a carrier or the like for transmission to the buyer, the carrier is presumed to be the buyer's agent not only to take delivery (s. 91, page 497 below), but to assent to the appropriation to the contract of the goods so delivered, subject of course, to any just grounds of exception which may be subsequently discovered. This is not sufficiently brought out in the text of the Contract Act. In the English Sale of Goods Act, s. 18, rule 5 (2), it is thus expressed:—

“Where, in pursuance of the contract, the seller delivers the goods to the buyer, or to a carrier, or other bailee . . . (whether named by the buyer or not), for purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.”

As Sir Mackenzie Chalmers says in his commentary (t), “It is often a nice question of law whether the acts done by the seller merely

(t) Chalmers on the Sale of Goods Act, 1893, p. 62, 7th ed. I entirely agree with Sir M. Chalmers that the questions of the

goods being finally ascertained and the property passing to the buyer should be carefully kept distinct.

express a revocable intention to appropriate certain goods to the contract"—i.e., specify them as the goods contracted for—"or whether they show an irrevocable determination of a right of éléction." "Such an appropriation is revocable by the party who made it and not binding on the other party unless it was made in pursuance of an authority to make the election conferred by agreement, or unless the act is subsequently and before its revocation adopted by the other party" (u).

"It may be admitted," said Baron Parke in 1848, "that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract are delivered to the carrier the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee (v); and if there is a binding contract between the vendor and vendee (w), . . . then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract." But this is subject to be negated by proof of a contrary intention, as where the seller shipping goods to the buyer reserves control to himself by taking a bill of lading to his own order (x). This last named transaction is very common, and its effect is to control the possession of the captain, and make the captain accountable to deliver the goods to the holder of the bill of lading. The bill of lading is the symbol of property, and by taking the bill of lading the vendor keeps to himself the right of dealing with the property shipped, and also the right of demanding possession from the captain. And this is consistent even with a special term that the goods are shipped on account of and at the risk of the buyer (y).

(u) Blackburn on Sale, 1st ed. 127; 2nd ed. by Graham, 129.

(v) This had already been treated as settled in 1803; *Dutton v. Solomonson* 3 B. & P. 582; 7 R. R. 883.

(w) The omitted words, referring to the Statute of Frauds, have no application in India.

(x) *Wait v. Baker*, 2 Ex. 1, 7; 76 R. R. 469, 474.

(y) *Shepherd v. Harrison* (1871) L. R. 5 H. L. 116, per Lord Westbury, at p. 128. The language of the original is here preserved, with only such alteration as is required to make the form of the statement general.

§. 83. The following lucid statement of the rules as to "appropriation" was judicially delivered by the late Lord Justice Cotton in 1878:—

"Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, but does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait v. Baker* (z), *Ellershaw v. Magniac* (a), and *Gabarron v. Kreeft* (b) in each of which cases the vendors had dealt with the bills of lading for their own benefit, the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does

(z) 2 Ex. 1. See note (x), p. 477, *clusive in absence of contrary indication*.
above.

(a) (1843) 6 Ex. 570 n.; 86 R. R. (b) L. R. 10 Ex. 274. See note (s), p. 398 (form of bill of lading held con- 466, above.

not pass to the purchaser ; and so it was decided in *Turner v. Trustees of Liverpool Docks* (c), *Shepherd v. Harrison* (d), *Ogg v. Skuter* (e). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done ; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser " (f).

In this case, accordingly, where the bills of lading had been handed to the bankers who discounted the bill of exchange drawn against the cargo, and this was done only to secure payment of the bill of exchange at maturity, it was held that the buyer was entitled to the goods on offering to pay the bill of exchange, and that his tender constituted a final appropriation vesting the property in him.

The following statements by the late Mr. Benjamin have become authoritative in England by high judicial approval :—

" Where goods are delivered by the vendor in pursuance of an order to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee.

" Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person

(c) (1851) 6 Ex. 543 ; 86 R. R. 377. The facts here were somewhat complicated, but the main point is that the fact of goods being shipped on the buyer's ship does not prevail over the terms of a bill of lading made out to the seller's order.

(d) L. R. 4 Q. B. 196 ; 5 H. L. 116. See note (y), p. 477, above.

(e) 1 C. P. Div. 47 (effect of bill of lading to shipper's order is to reserve right not only of possession, but of disposal of the goods as against a buyer in default).

(f) Per Cotton, L.J., *Mirabita v. Imperial Ottoman Bank* (1878) 3 Ex. Div. at pp. 172, 173.

8. 88. indicated by the bill of lading as the one for whom they are to be carried " (g).

On the other hand, if the seller sends out bills of lading which make the goods deliverable to the buyer's order, this is a strong confirmation of the normal presumption that delivery to a carrier, and especially a shipmaster, passes property. "We conceive it is perfectly settled," said the Court of Appeal in England, in 1876, "that if a consignor in such a case wishes to prevent the property in the goods and the right to deal with the goods whilst at sea from passing to the consignee, he must, by the bill of lading, make the goods deliverable to his own order, and forward the bill of lading to an agent of his own. If he does not do that, he still retains the right of stopping the goods in transition [as to which see ss. 99--106, pp. 510--528, below] but subject to that right the property in the goods and the right to the possession of the goods is in the consignee. . . . [In *Shepherd v. Harrison* (h)] the consignor did take the precaution of making the goods deliverable to his own order, and of forwarding the indorsed bill of lading, together with the bill of exchange, to an agent of his own. The agent forwarded the bill of lading and the bill of exchange in the same letter to the consignee, and requested him to accept the bill of exchange and return it. Under these circumstances it was held by the House of Lords that the consignee had no right to keep the bill of lading without accepting the bill of exchange. This case is no authority for holding that, if the property in the goods had already passed, the property would revert on the bills of exchange being refused acceptance" (i).

It may be stated on the whole, in a summary way, that generally delivery to a carrier or bailee who receives the goods for transmission to the buyer appropriates those goods to the contract; but the seller may exclude the operation of this rule by reserving the power of disposal. In particular the appropriation may be and constantly is made

(g) Benjamin on Sale, Book II. Chap. VI *ad fin.*, p. 400 in 5th ed. adopted by Lord Chelmsford in *Shepherd v. Harrison*, L. R. 5 H. L. at p. 127. The whole series of rules propounded in the continuation of the passage may be

profitably consulted.

(h) L. R. 5 H. L. 116; note (g), p. 477, above.

(i) *Ex parte Banner* (1876) 2 Ch. Div. 278, 288, 289.

conditional on payment or tender of the price (j), or acceptance of a bill of exchange sent forward with the bill of lading; this last is quite common practice. In such cases the property passes only when the condition is satisfied. The fact of the seller taking a bill of lading to his own order is strong evidence that the appropriation is conditional indeed, the rule that such is the legal effect is quite as definite and important as the primary rule as to the effect of unconditional delivery; and the use of this precaution by the seller throws on the buyer the burden of showing that the appropriation was intended to be final. This may be shown, for example, if the result of the circumstances and course of dealing of the parties is that the sellers took the bill of lading in their own name only because they were not quite sure of the construction of the buyer's acceptance of their offer, whereas in fact he did mean to accept the cargo, and acted accordingly (k).

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It should be noted that, in case of difference, the terms of the bill of lading prevail over those of an invoice, and, it seems (l), over any inference from ambiguous terms in any other document evidencing the contract. "It is perfectly well settled that . . . the entry upon the invoice stating the goods to be shipped on account and at the risk of the consignee is not conclusive, but may be overruled by the circumstance of the *jus disponendi* being reserved by the shipper through the medium of the bill of lading." (m).

Attention to the principles established under the present head will be found to remove many of the difficulties which arise on the more special question of an unpaid seller's right to stop goods in transit.

Assent to appropriation.—Where the seller unconditionally appropriates goods of the proper description to the contract, the buyer having asked for a delivery order, and so notifies the buyer, the buyer's assent may be inferred after the expiry of a reasonable time without dissent (n).

(j) For a case of conditional appropriation in dealing with goods on land, see *Godts v. Rose*, referred to under s. 90, illustration (f), p. 491 below.

(k) *Joyce v. Swann* (1864) 17 C. B. N. S. 84. There was no question between the parties to the sale, but only between the buyer and underwriters as

to insurable interest, the cargo having been lost by wreck.

(l) See *Ogg v. Shuler* (1875) 1 C. P. Div. 47.

(m) Lord Cairns in *Shepherd v. Harrison*, L. R. 5 H. L. at p. 131.

(n) *Pionataro v. Gilroy* [1919] 1 K. B. 459.

ss. 83, 84. Goods ordered by tradesmen in India from Europe.—The following passago from Mr. Benjamin's treatise on sale of goods ^(o) indicates at what stage property in goods shipped from Europe to India may pass to the Indian firm ordering the goods :—

"If A., in New York, orders goods from B., in Liverpool, without sending the money for them, there are two modes usually resorted to among merchants by which B. may execute the order without assuming the risk of A.'s inability or refusal to pay for the goods on arrival. B. may take the bill of lading, making the goods deliverable to his own order or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may not choose to advance the money in Liverpool and may draw a bill of exchange for the price of goods on A., and sell the bill to a Liverpool banker, transferring to the banker the bill of lading for the goods to be delivered to A. on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B. had the least idea of passing the property to A. at the time of appropriating the goods to the contract, so that although he may write to A., and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B., or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A."

84.—Where the goods are not ascertained at the time of making the contract of sale, and by the terms of the contract the seller is to do an act with reference to the goods which cannot be done until they are appropriated to the buyer, the seller has a right to select any goods answering to the contract, and by his doing so the goods are ascertained.

Ascertainment of goods by seller's selection.

Illustration.

B. agrees with A. to purchase of him at a stated price, to be paid on a fixed day, 50 maunds of rice out of a larger quantity in A.'s granary. It is agreed that B. shall send sacks for the rice, and that A. shall put the rice into them. B. does so, and A. puts 50 maunds of rice into the sacks. The goods have been ascertained [*Aldridge v. Johnson*, more fully stated as supplementary illustration No. 2 to s. 83, p. 474, above.]

(o) P. 376, 5th ed., cited with approval in *Re Cargo ex s.s. Rappenfels* (1915) 42 Cal. 334, 342-43.

It is rather difficult to see why this is a separate section ; the proposition appears to be subordinate to the principle laid down in s. 83. Presumably it was intended to declare existing law, but to the present writer it seems by no means clear that the English authorities warrant the statement in this positive and unqualified form. However, the result is probably the same in almost every case that is likely to occur in the course of business. This section does not appear to have been judicially considered.

Perhaps this is the best place to observe that failure on the seller's part to satisfy the conditions required for ascertaining and appropriating the goods contracted for cannot be remedied in the buyer's favour by construction of law on the ground that the seller ought to have done what he did not. Where a seller in effect refuses to appropriate a particular cargo to the contract, taking bills of lading to the order of a real or fictitious nominee of his own, his conduct may be a breach of contract in the circumstances, but property in that cargo will none the more be transferred for that reason (p).

An unsuccessful attempt by a seller to appropriate a cargo to the contract will not prevent him from appropriating another cargo and insisting on the buyer accepting it, if he can do so in accordance with the terms of the contract as to time and otherwise (q).

85.—Where an agreement is made for the sale of immoveable and moveable property combined, the ownership of the moveable property does not pass before the transfer of the immoveable property.

Transfer of ownership of moveable property, when sold together with immoveable.

Illustration.

A. agrees with B. for the sale of a house and furniture. The ownership of the furniture does not pass to B. until the house is conveyed to B.

Mixed sales of moveable and immoveable property.—A contract of this kind is, on the face of it, no more than a contract that, when the

(p) *Gabarron v. Kreeft* (1875) L.R. 10 Ex. 274. cargo had been found invalid by an arbitrator, whose decision the C. A. obviously thought wrong, but no question of its correctness was before them.

(q) *Borrouman v. Free* (1878) 4 Q. B. Div. 500. The tender of the first

13. 85, 86. conveyance is completed, the furniture shall be sold ; and property in the furniture does not pass before that time (r). The rule is in truth elementary, so much so that the existence of direct authority for it may be regarded as accidental. Observe that the word “ combined” in the text is important : if a house and the furniture in it were sold to the same buyer by simultaneous but distinct contracts, the section would not apply.

As to the period of limitation for a suit by a purchaser of movable and immovable property to recover the movable property from the hands of a subsequent purchaser, see *Dhondiba v. Ramechandra* (s).

86.—When goods have become the property of the buyer, he must bear any loss arising from their destruction or injury.

Buyer to bear loss
after goods have
become his property.

Illustrations.

(a) B. offers, and A. accepts, 100 rupees for a stack of firewood standing on A.'s premises, the firewood to be allowed to remain on A.'s premises till a certain day, and not to be taken away till paid for. Before payment, and while the firewood is on A.'s premises, it is accidentally destroyed by fire. B. must bear the loss.

(b) A. bids 1,000 rupees for a picture at a sale by auction. After the bid, it is injured by an accident. If the accident happens before the hammer falls, the loss falls on the seller ; if afterwards, on A. [*Cp. Sawling v. Turner*, note (w), p. 486, below.]

Risk of destruction or injury.—As in our law property can be transferred by the contract itself, subject to the goods being ascertained, it is natural to hold that, in the absence of special terms, the risk follows the property. But it might have been held that property is transferred only by delivery, and nevertheless the contract is effectual to change the risk independently of delivery ; this would make an exception to the general rule that risk accompanies ownership. Such is, in fact, the law of Scotland and various countries which follow the Roman law. There is nothing in the law of England to prevent parties from agreeing, if they please, that the risk shall pass at some time or on some condition which is not necessarily simultaneous with the passing of property ; and thus the ownership may in particular

(r) *Lanyon v. Toogood* (1844) 13 (s) (1881) 5 Bom. 554.

M. & W. 27, 29.

cases be separated from the risk (t). The possibility of such being the contract between the parties has been thus expressed by Lord Hatherley :—

S. 86

“ It is perfectly conceivable—indeed, in many cases it has been so as a matter of fact—that a person, selling some goods at a distant place to a person living in this country, may say : ‘ I am perfectly willing to sell you these goods. I am perfectly willing to complete the cargo so to be sold, but I do not intend to be at the risk of their loss during the transit or on the voyage ; and although you will not be expected to pay for the goods and acquire the property until you have the bills and the documents attached sent to you, still in the meantime there will be a risk in transit, and that is a risk which I am not desirous of undertaking, and I must throw that risk upon you as part of our bargain.’ ” (u).

Goods in a house held on lease were sold by auction under conditions expressly providing that all lots should be taken to be delivered at the fall of the hammer, after which time they should remain at the exclusive risk of the purchaser. After the sale, the rent of the house being in arrear, the landlord threatened to distrain on these goods, and the auctioneer paid the rent, and paid over only the net proceeds of the sale to the owner, on whose behalf he had sold the goods. It was held that he had no right to make this deduction; for the property and risk in the goods had passed to the respective purchasers at the auction as soon as the bids were accepted, and the seller had no more interest in them, and consequently no interest in the rent being paid from which an authority to the auctioneer to pay it could be implied. “ It is thoroughly established . . . that by the English law, where a bargain and sale is completed with respect to goods, and every thing to be done on the part of the vendor before the property should pass has been performed, then the property vests in the purchaser, although the vendor still retains his lien, the price of the goods not

(t) *Martineau v. Kitching* (1872) L. R. 7 Q. B. 436, a peculiar case where the majority of the Court thought it immaterial whether property had passed or not, the risk having passed to the buyer by the terms of the contract.

See also *Casile v. Playford*, L. R. 7 Ex. 98; *Anderson v. Morice*, L. R. 10 C. P. 609; 1 App. Ca. 713.

(u) *Anderson v. Morice*, 1 App. Sa. at pp. 728, 729.

86, 87. having been paid (*v*); and any accident happening to the things subsequently, unless it is caused by the fault of the vendor, . . . must be borne by the purchaser, and, by parity of reasoning, any benefit for them is his benefit and not that of the vendor" (*w*).

Where the defendant purchased 975 maunds of rice, being the whole contents of a gola, and paid earnest-money and took part delivery of the rice, and the rest was destroyed by fire, it was held that, the property having passed to him, he was liable for the balance of the price (*x*).

Illustration (a) to the present section also negatives any supposition that the seller of goods which remain in his custody after the property has passed, and are accidentally destroyed without his fault before delivery, is liable to an action for a breach of contract in not delivering them. Compare s. 56, p. 322, above.

As to immoveable property, it is provided by the Transfer of Property Act that where the ownership of the property has passed to the buyer he is bound to bear any loss arising from destruction, injury, or decrease in value of the property not caused by the seller [s. 55 (5), (c)]. But a mere contract for the sale of immoveable property does not of itself even create any interest in, or charge on, the property (s. 54). See also the Specific Relief Act, s. 13.

87.—When there is a contract for the sale of goods not yet in existence, the ownership of the goods may be transferred by acts done, after the goods are produced in pursuance of the contract, by the seller, or by the buyer with the seller's assent.

Transfer of ownership of goods agreed to be sold while non-existent.

Illustrations.

(a) A. contracts to sell to B, for a stated price, all the indigo which shall be produced at A.'s factory during the ensuing year. A., when the indigo has been manufactured, gives B. an acknowledgment that he holds the indigo at his disposal. The ownership of the indigo vests in B. from the date of the acknowledgment.

(v) See ss. 95—98, pp. 502-509 below.

(x) *Shoshi Mohun Pal v. Nobo Kristo Poddar* (1878) 4 Cal. 801; see the

(w) *Sweeting v. Turner* (1872) L.R. commentary on s. 81.

7 Q. B. 310, 313, per Blackburn, J.

(b) A., for a stated price, contracts that B. may take and sell any crops that shall be grown on A.'s land in succession to the crops then standing. Under this contract, B., with the assent of A., takes possession of some crops grown in succession to the crops standing at the time of the contract. The ownership of the crops, when taken possession of, vests in B. [In England a grant of a tenant's growing crops and all his unexpired tenant right and interest has the same effect : *Petch v. Tulin* (1846) 15 M. & W. 110.]

(c) A., for a stated price, contracts that B. may take and sell any crops that shall be grown on his land in succession to the crop then standing. Under this contract, B. applies to A. for possession of some crops grown in succession to the crops which were standing at the time of the contract. A refuses to give possession. The ownership of the crops has not passed to B., though A. may commit a breach of contract in refusing to give possession.

Sale of goods to be produced in future.—Logically this section is covered by s. 82. If a contract of sale cannot transfer ownership in existing but unascertained goods without some act appropriating them to the contract, much less can it have any such effect as regards goods not in existence. But in English authorities the rule appears as a distinct and wider rule in the law of property. "It is a common learning in the law that a man cannot grant or charge that which he hath not" (y). But future products of existing property can be granted. Of such things the grantor is said to have a potential possession. "He that hath [the land] may grant all fruits that may arise upon it after, and the property shall pass so soon as the fruits are extant" (z). This extends only to natural produce, and not to after-acquired stock in trade, or the like. The produce must be of existing property. "A man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter" (a). Accordingly a bill of sale purporting to comprise all the goods "now remaining and being, or which shall at any time hereafter remain and be," in or about the grantor's house at Z., does not of itself pass property in after-acquired goods, and can be made to apply to them only by some new specific act appropriating

(y) Perkins, Profitable Book, Grants, pl. 65 ; per Cur., *Lunn v. Thornton* (1845) 1 C. B. 379, 386 ; 68 R. R. at p. 727.

(z) *Grantham v. Hawley*, Hob. 132; *Waddington v. Brislow*, 2 Bos. & Pul. 452.

(a) *Ib.* This does not mean that he

cannot make a binding contract to sell and deliver the wool when he has it, but that such a contract will create only personal rights and not a right *in rem* to the wool promised. See Sir M. Chalmers's comment, *Sale of Goods Act*, pp. 26, 27.

3. 87. them to the grant (b). For examples of such appropriation see on s. 83, p. 473, above.

These rules do not apply in English law to equitable assignments by way of security or otherwise; but inasmuch as such an assignment does not at any time transfer ownership, but only a right on the part of the assignee to obtain the benefit of the right which has been assigned to him by the assignor, the subject is not properly before us here, and it will suffice to refer to a few passages of Lord Macnaghten's judgment in what is now the leading case (c): "It has long been settled that future property possibilities and expectancies are assignable in equity for value. . . . To effectuate the intention and assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor, and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified. . . . The truth is that cases of equitable assignments or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case." Such applications are liable to be complicated by the existence of imperative statutory rules as to particular kinds of transactions or dealings with particular kinds of property, as in England the Bills of Sale Acts; and care must be taken not to assume too hastily that the general principle will have its normal operation in any given state of facts. The general equitable principle in question has been recognised and applied in Indian courts. Thus where A. at Virangam consigned goods to B. at Bombay for sale on commission, and drew hundis against the goods which B. accepted and paid, and it was arranged that B. should pay himself the advances out of the sale proceeds of the goods when he received and sold them, it was held that the agreement constituted a good equitable charge upon the

(b) *Lunn v. Thornton*, note (y), 13 App. Ca. 523, at pp. 543, 547. See p. 487, above. also *Brandt's Sons & Co. v. Dunlop*

(c) *Tailby v. Official Receiver* (1883) *Rubber Co., Ltd.* [1905] A. C. 454.

goods, and that they could not therefore be attached by persons holding decrees against A., even though the goods had not yet come into the possession of B. (d). There is a similar recent case in the High Court of Madras, where money was advanced by A. to B. to cut and prepare timber in a forest, and A. was to pay himself the advances out of the sale proceeds of the goods when he received and sold them (e).

88.—A contract for the sale of goods to be delivered at a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time, he has no reasonable expectation of acquiring them otherwise than by purchase.

Contract to sell and deliver, at a future day, goods not in seller's possession at date of contract.

a future day is binding, though the goods are not in the possession of the seller at the time of making the contract, and though, at that time, he has no reasonable expectation of

acquiring them otherwise than by purchase.

Illustration.

A. contracts, on the 1st January, to sell B. 50 shares in the East Indian Railway Company, to be delivered and paid for on the 1st March of the same year. A., at the time of making the contract, is not in possession of any shares. The contract is valid.

Future delivery.—Probably it would have been¹ thought needless to declare this rule but for the case of *Hibblerwhite v. McMorine* (1839) 5 M. & W. 462, the head-note of which is reproduced, with a little condensation, by this section. There an attempt was made to maintain the contrary, on the authority of a decision of Lord Tenterden at Nisi Prius, founded on some ground of supposed public policy; but, as Alderson, B., observed, if such a ruling were followed, “it would put an end to half the contracts made in the course of trade.” The facts were similar to those given in the illustration. Shortly afterwards the decision was confirmed in a case involving other points also (f). No one has thrown any doubt on it since.

(d) *Velji Hirji & Co. v. Bharmal* (1886) 21 Bom. 287; *Palaniappa v. Lalshumanan* (1892) 16 Mad. 429; *Baldeo Prasad v. Miller* (1904) 31 Cal. 667 (mortgage of indigo-cakes to be manu-
factured hereafter).
(e) *Maradugula v. Kotala* (1911) 21. Mad. L. J. 413.
(f) *Mortimer v. McCallan* (1840) 6 M. & W. 58; 55 R. R. 503, 513, 517, 518.

Sec. 88, 90.

89.—Where the price of goods sold is not fixed by the contract of sale, the buyer is bound to pay the seller such a price as the Court considers reasonable.

Determination
of price not fixed
by contract.

Illustration.

B, living at Patna, orders of A., a coachbuilder at Calcutta, a carriage of a particular description. Nothing is said by either as to the price. The order having been executed, and the price being in dispute between the buyer and the seller, the Court must decide what price it considers reasonable.

“ A contract for the sale of a commodity in which the price is left uncertain is in law a contract for what the goods shall be found to be reasonably worth” (g), said Tindal, C.J., on facts resembling those of the illustration. What is a reasonable price is a question of fact to be determined according to the circumstances of each particular case. Where the goods are such that there is a market price for them, the market price will be evidence of what is a reasonable price between the parties, though not conclusive, as accidental circumstances may make the current price unreasonable in the particular transaction (h). A subsequent fixing of the price by agreement of the parties is very strong evidence of what they think, and therefore of what for them is reasonable. On principle it seems to be strictly nothing more, unless the circumstances are such that it operates as a novation. But no question of practical importance appears to arise on this.

Delivery.

90.—Delivery of goods sold may be made by doing anything which has the effect of putting them in the possession of the buyer, or of any person authorised to hold them on his behalf.

Delivery how
made.

Illustrations.

(a) A. sells to B., a horse, and causes or permits it to be removed from A.'s stables to B.'s. The removal to B.'s stable is a delivery. [*Elmore v.*

(g) *Headly v. McLaine* (1834) 10 17 C. B. N. S. at p. 102.
Bing. 482; 38 R. R. 510, 514; con- (h) *Acebal v. Levy* (1834) 10 Bing.
firmed (not that further authority is 376; 38 R. R. 469, 475.
needed) by Willes, J., in *Joyce v. Swann*,

Stone (1809) 1 Taunt. 458 ; 10 R. R. 578 was a stronger case. There it was held sufficient delivery where the seller agreed at the buyer's request to keep the horse at delivery, and moved it into another part of his own stables.]

(b) B., in England, orders 100 bales of cotton from A., a merchant of Bombay, and sends his own ship to Bombay for the cotton. The putting the cotton on board the ship is a delivery to B.

(c) A. sells to B. certain specific goods which are locked up in a godown. A. gives B. the key of the godown in order that he may get the goods. This is a delivery.

(d) A. sells to B. five specific casks of oil. The oil is in the warehouse of A. B. sells the five casks to C. A. receives warehouse rent for them from C. This amounts to a delivery of the oil to C., as it shows an assent on the part of A. to hold the goods as warehouseman of C. [*Hurry v. Mangla* (1808) 1 Camp. 452 ; 10 R. R. 727 (i)].

(e) A. sells to B. 50 maunds of rice in the possession of C., a warehouseman. A. gives B. an order to C. to transfer the rice to B., and C. assents to such order, and transfers the rice in his books to B. This is a delivery. [The normal case, assumed as such in all the decisions on more complex facts.]

(f) A. agrees to sell B. five tons of oil at 1,000 rupees per ton, to be paid for at the time of delivery. A. gives to C., a wharfinger, at whose wharf he has twenty tons of oil, an order to transfer five of them into the name of B. C. makes the transfer in his books, and gives A.'s clerk a notice of the transfer for B. A.'s clerk takes the transfer notice to B., and offers to give it him on payment of the price of the oil. B. refuses to pay. There has been no delivery to B., as B. never assented to make C. his agent to hold for him the five tons selected by A. [Even if the wharfinger, after the seller has notified him not to deliver the oil, does deliver it to the buyer, this is not a delivery under the contract, and does not pass either property or the right to possession : *Godts v. Rose* (1855) 17 C. B. 229. In such a case the goods have never been ascertained (see the judgment of Willes, J.).]

Additional Illustrations.

A. agrees with B. to sell B. a horse. Thereupon A. asks B. to lend him the horse for a short time. B. assents and leaves the horse in A.'s custody. This is a delivery to B. [*Marvin v. Wallis* (1856) 6 E. & B. 726 ; 106 R. R. 784.]

B. agrees with A. to buy a horse from him for Rs. 500, and to fetch it away on a day named, the bargain being for ready money. Shortly

(i) At the date of this case the distinction between an unpaid vendor's lien on goods remaining in his possession and the right to stop in transit was not yet understood, and the head-note and the judgment both say, erroneously according to modern usage, that the right to stop *in transitu* was at an end. See further on this case below.

- S. 90. before the day named B. comes back, rides the horse, and asks A. as a favour to keep it for him another week, saying that at the end of the week he will call and pay for it. Before the end of the week the horse dies. There has been no delivery and no transfer of ownership, and the loss must be borne by A. [*Tempest v. Fitzgerald* (18.0) 3 B. & Ald. 680 ; 22 R. R. 526.]

Acceptance and receipt.—In English law a contract for the sale of goods of the value of £10 or upwards is, by statute, not enforceable unless “the buyer shall accept part of the goods so sold and actually receive the same,” or satisfy one of other alternative conditions not now material (*j*). Hence there have been many decided cases as to what amounts to acceptance and receipt for this purpose. There have also been many decisions on the question of what amounts, apart from the statute, to a delivery transferring possession from the seller to the buyer, which question may arise in various ways either between the parties or by reason of adverse claims of third persons. The “actual receipt” of the Statute of Frauds appears, on the whole, to correspond to the “delivery” of the present section, regarded, however, from the buyer’s point of view. Acceptance is something more, namely, recognition of certain goods as part of the goods sold under the contract in question, “such a dealing with the goods as amounts to a recognition of the contract.” Whether the buyer’s conduct satisfies this description is a question of fact. It may or may not also be an appropriation to the contract of goods previously unascertained, and it need not amount to an admission that the goods are according to contract (*k*). Acceptance and receipt, taken together, seem to mean that the buyer has assumed possession of some part of the goods with reference to the contract of sale and as being appropriated thereto.

Although the Statute of Frauds is happily not in force in British India, principles of general application are often involved in English

(*j*) Sale of Goods Act, 1893, s. 4, Div. 228 (see per Bowen, L.J., at p. reproducing in substance the 17th section of the Statute of Frauds. On the definition of acceptance, see sub-s. 3. 233) ; *Taylor v. Smith* [1893] 2 Q.B. 65, C. A. ; *Abbott v. Wolsey* [1895] 2 Q. B. 97, C. A.

(*k*) *Pagc v. Morgan* (1885) 15 Q. B.

cases decided upon the statute, and therefore some acquaintance with its provisions (now re-enacted and in part made clearer by the Sale of Goods Act) is still indispensable to Indian practitioners, at any rate in the High Courts, in order to understand which parts of the English judgments turn only on the language of the statute and which have an independent value. S. 90.

"Symbolic" delivery.—Illustration (e) treats the delivery of the key to the purchaser as transferring possession because, and only because, it gives him actual control of the place where the goods are, and thereby of the goods themselves. This is believed to be the correct view in English law, notwithstanding the language that has sometimes been used about symbolic delivery. As Lord Hardwicke said more than a century and a half ago, "delivery of the key of bulky goods . . . has been allowed as delivery of the possession, because it is the way of coming at the possession or to make use of the thing, and therefore the key is not a symbol, which would not do" (l). But delivery of a key may properly be called a symbol in so far as it is an emphatic declaration of intention to transfer control; in this manner it may be material even in the case of immoveables, where it could have no effect standing alone.

A. goes to live in B.'s house with B.'s consent. C., acting under A.'s orders, takes furniture of A.'s to B.'s house, puts it in certain rooms, locks the doors of those rooms, and takes away the key, to the knowledge of B.'s servants and without any objection. This is relevant to show that A. has not delivered the goods to B. to hold as bailee, but, on the contrary, B. has given possession to A. of the rooms in which the goods are placed (m). In the case of goods, the effect of delivering a key, so far as it is effective, is to give actual control of the goods. Delivery of the key of a wharf where timber is lying has been judicially said to carry "manual control" of the timber (n). Nor is this surprising; for actual possession of partially cleared lands, bulky goods, and so forth, has always been held to be acquired by such control and occupation as the nature of the subject-matter

(l) *Ward v. Turner*, 2 Ves. Sr. 431; Div. 285.

1 Dick. 170.

(n) *Gough v. Everard* (1863) 2 H.

(m) *Ancona v. Rogers* (1876) 1 Ex. & C.1; 133 R. R. 558.

8. 90. admits (·). This has been admitted to be the governing principle even when the terms "symbol" and "constructive possession" have been, perhaps not quite aptly, used at the same time (p). It is conceived that merely telling a man that the key of a warehouse, etc., is at his disposal is at most a licence, and, as regards property or possession, has no effect at all until he acts on the authority (q).

Delivery of a key does not operate as delivery of the goods under the lock if it does not in fact give complete access to them. Where a seller gave the buyer the key of a receptacle in which the goods were, but retained the key of an outer inclosure, it was held without difficulty that the buyer had not acquired possession (r). In such a case the seller's possession continues, not because he has in fact complete and exclusive control (for he has it not), but because the common law does not recognise any partial transfer of possession, and does not allow possession to be vacant, and legal possession once acquired continues until it is completely changed, or the subject-matter ceases to exist.

Constructive delivery.—Apart from this rather outlying question, it is to be observed, and it is shown by the illustrations to this section, that a change in the possession of goods, and therefore delivery within the definition above, may take place without any change in their actual and visible custody. There is said to be a constructive delivery in such cases, and they may be classified as follows (s):—

1. A seller in possession of the thing sold assents to hold it solely on the buyer's account. There may be constructive delivery of this

(o) See *Lord Advocate v. Young* (1887) 12 App. Ca. at pp. 553, 556. it would not be law; but there is no necessity to read it so.

(p) *Hilton v. Tucker* (1898) 39 Ch. D. 669, 676. If C., holding for A. the key of a room containing A.'s goods, is told by A., with B.'s consent, to hold it at B.'s disposal, this may well enough be called a constructive delivery to B.; but it is not clear from the report exactly what the facts were, or were thought by the Court to be. (r) *Milgate v. Kebble* (1841) 3 Man. & Gr. 100; 60 R. R. 475. This case is cited in text-books as an authority on unpaid vendor's lien, but really adds nothing to the law on that head. The only question was whether there had been a delivery, and it was so treated by the Court.

(s) Cp. Chalmers on Sale of Goods Act, 140; Pollock and Wright on Possession, 48, 71—75.

(q) If *Hilton v. Tucker* (last note) meant to decide the contrary, we think

kind whether he continues to hold as a bailee for reward or as a gratuitous borrower (see *Marvin v. Wallis*, p. 491, above). The seller's assent must be proved; it will not be presumed (t). But acts of the buyer treating himself as owner and the seller as his servant or bailee are relevant to prove delivery as against the buyer. Where A. ordered a certain quantity of goods (not yet specified) of B., and B. sent A., an invoice specifying particular goods as sold to A. "free for six months," i.e., to remain in B.'s warehouse without charge, credit being also given for six months, and at the end of the six months A. asked B., if he would take the goods back or sell them on A.'s account, this was held evidence of assent by A. to B. holding those goods for him as warehouseman (u). The fact that the buyer pays or agrees to pay warehouse rent for goods left in the seller's warehouse is not of itself sufficient to show that the seller holds as his bailee. The case is not the same where the first buyer sells to a sub-purchaser, and the first seller assents, by his direction, to hold the goods for the sub-purchaser: see Illustration (d). In the case on which that illustration is founded *Lord Ellenborough*, it is true, used language to the effect that acceptance of warehouse rent is of itself "a complete transfer of the goods": "If I pay for a part of a warehouse so much of it is mine." These observations would be applicable if the buyer had actually rented part of the warehouse, and the goods bought by him were transferred to that part. If there is nothing but payment of warehouse rent, or agreement to pay it, the proposition is too wide, and is disallowed by later authorities (v). The correct reason alone, as applicable to the case where there is a sale over to a new purchaser, is given by the illustration. The assent of B. that the goods shall be held for C. is assumed. It would perhaps have been better to state it more

(t) *Re Roberts* (1887) 36 Ch. D. 196, 200.

(u) *Castle v. Swooner* (1861) 6 H. & N. 828; 123 R. R. 860, Ex. Ch., distinguished in *Dublin City Distillery v. Doherty* [1914] A. C. 823, where Lord Atkinson reviews the authorities on constructive delivery. The facts were rather peculiar.

(v) *Miles v. Gorton* (1834) 2 Cr. & M. 504; 39 R. R. 820, approved in

Grice v. Richardson (1877) 3 App. Ca. 319; "I do not think that the payment of warehouse rent has the effect of a constructive delivery of the whole in a case where the goods remained in the possession of the vendor." It is not quite clear what, in the later case, the Judicial Committee meant by saying that there was no "actual delivery."

See *Blackburn on Sale*, 2nd ed. 341.

8. 90. distinctly as one of the material facts ; for the case is really one of "agreement by attornment" (see the following paragraph). Lord Ellenborough's language, in fact, does not accord with commercial usage. Warehouse rent is not rent in the ordinary economic sense, and the owner making the payment so called is not entitled to have his goods stored in any particular part of the warehouse. He is no more a tenant than the railway passenger who leaves goods in a cloak-room.

2. The most frequent and important case is where a seller and buyer agree, with the assent of a third person in whose custody the goods are and who has been holding them for the seller, that he shall hold them on account of the buyer. Such an "agreement of attornment," as it is sometimes called, has the effect of transferring legal possession to the buyer. All three parties must concur ; the mere handing of a delivery order or the like by the seller to the buyer is not enough (w) ; the seller's bailee must be instructed and must assent to hold for the buyer.

3. If the buyer is already holding the goods as the seller's bailee, and the seller agrees with him that he shall hold them as owner, the character of the possession is changed accordingly, and the buyer ceases to hold as bailee, and begins to hold as owner, as where an agent entrusted with goods for sale agrees to buy them himself (x). Acts relied on to prove such an agreement must, of course, be unambiguous. This case is not very common.

The significance of this group of sections on delivery can be fully understood only in connection with the subsequent sections on seller's lien and stoppage in transit.

It is not every case in which delivery is spoken of that illustrates the present section. Thus an auctioneer who sold a rick of hay standing, and showed an acknowledgment from the owner of his right to sell, was held not liable to an action at the suit of the buyer for not delivering the hay when the owner afterwards wrongfully revoked his

(w) *McEwan v. Smith* (1849) 2 H. keeping a delivery order is evidence L. C. 309 ; 81 R. R. 166 ; *Farina v. Home* of acceptance, but not of receipt.

(1846) 16 M. & W. 119 ; 73 R. R. 433. (x) *Edan v. Dudfield* (1841) 1 Q. B. In the language of the English cases 302 ; 55 R. R. 258.
on the Statute of Frauds, taking and

authority and refused to give the buyer, on the auctioneer's order, **8s. 90,** access to the hayrick (y). The purchaser bought with knowledge of all the facts, and the auctioneer, who never had any possession at all either of the hay or of the place where it stood, could do no more for the purchaser than he did. But it is clear that the buyer did not acquire possession, though he did acquire property and an immediate right to possess the goods; there was therefore no question of delivery within the meaning of the present section.

Dealings with delivery orders and the like may have important effects on the title to goods under s. 108 (see that section and the commentary thereon, p. 532 *et seq.* below).

91.—A delivery to a wharfinger or carrier of the goods sold has the same effect as a delivery to the buyer, but does not render the buyer liable for the price of goods which do not reach him, unless the delivery is so made as to enable him to hold the wharfinger or carrier responsible for the safe custody or delivery of the goods.

Illustration.

B., at Agra, orders of A., who lives at Calcutta, three casks of oil to be sent to him by railway. A. takes three casks of oil directed to B. to the railway station, and leaves them there without conforming to the rules which must be complied with in order to render the railway company responsible for their safety. The goods do not reach B. There has not been a sufficient delivery to charge B. in a suit for the price.

Delivery to wharfinger or carrier.—In England it has been for more than a century “a proposition as well settled as any in the law that if a tradesman order goods to be sent by a carrier, though he does not name any carrier, the moment the goods are delivered to the carrier it operates as a delivery to the purchaser” (z). The qualifying part of

(y) *Salter v. Woodlams* (1841) 2 Man. & G. 650; 58 R. R. 513. We must respectfully dissent from the opinion expressed in Benjamin on Sale (4th ed. at p. 683) that the former owner actually became a bailee by attorning in advance to an unknown purchaser. This does not affect the practical result of the case. On Mr. Benjamin's view the buyer was a bailor at will, and might have had an action of trespass *vi et armis* against a stranger. We think not, but no such question arose. See now the editors' addition in 5th ed. 693.

(z) *Dutton v. Solomonson* (1803) 3 Bos. P. & 582; 7 R. R. 883.

91, 92. the section embodies a decision not much later. There the seller had sent goods by carriers who notoriously professed not to answer for goods worth more than £5, unless specially entered and paid for. The seller omitted to make any special entry, and the goods never reached the buyer. It was held that the seller could not recover the price from the buyer. It was the seller's duty "to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance as that in case of a loss the defendant might have his indemnity against the carriers." (a).

In India the following requirements are established by general legislation :—

Under s. 3 of the Common Carriers Act III of 1865, no carrier is liable for loss of certain goods above Rs. 100 in value, unless the person delivering the goods shall have expressly declared the value and description thereof. Similarly, under ss. 72 and 73 of the Indian Railways Act IX of 1890, no railway company is liable to pay more than a specified value for the loss or destruction of certain animals, unless the person delivering the animals should have declared them to be of a higher value. Accordingly consignors neglecting to make the required declarations do so at the peril of losing their right to recover the price from the buyer if the goods miscarry.

This section must of course be read with and subject to ss. 99, 100 as regards an unpaid vendor's right to stop the goods in transit.

92.—A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Effect of part delivery.

Illustrations.

(a) A ship arrives in a harbour laden with a cargo consigned to A., the buyer of the cargo. The captain begins to discharge it, and delivers over part of the goods to A. in progress of the delivery of the whole. This is a

(a) *Clarke v. Hutchins* (1811) 14 East, 475; 13 R. R. 283.

delivery of the cargo to A. for the purpose of passing the property in the cargo.

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(b) A. sells to B. a stack of firewood, to be paid for by B. on delivery. After the sale, B. applies for and obtains from A. leave to take away some of the firewood. This has not the legal effect of delivery of the whole. [*Bunney v. Poyntz* (1833) 4 B. & Ad. 568; 38 R. R. 309.]

(c) A. sells 50 maunds of rice to B. The rice remains in A.'s warehouse. After the sale, B. sells to C. 10 maunds of the rice, and A., at B.'s desire, sends the 10 maunds to C. This has not the legal effect of a delivery of the whole. [See next page.]

[A. sells five bales of goods to B. to be paid for on delivery. B. receives and pays for one bale, and refuses to take the others as not being according to description. There has not been a delivery of the whole, and A. may be entitled to sue B. for not accepting the four bales, but cannot sue for their price: *Mitchell, Reid & Co. v. Buldeo Doss* (1887) 15 Cal. 1.]

Part delivery.—This affirms the common law rule that delivery of part may be a delivery of the whole if it is so intended and agreed, but not otherwise, and the burden of proof seems to be on the party affirming that such was the intention (b). "It seems to me", said Brett, L.J., "that a delivery of part, or even of the bulk of a cargo, is not *prima facie* a delivery of the whole, and that those who rely upon the part delivery as a constructive delivery of the whole are bound to show that the part delivery took place under such circumstances as to make it a constructive delivery of the whole" (c). "It is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole" (d), i.e. a recognition that the actual holder of the residue has begun to hold as a buyer's agent. "If part be delivered with intent to separate that part from the rest, it is not an inchoate delivery of the whole"; still less can it be so if there is a refusal to deliver the whole (e). What was the intention in any particular transaction

(b) Lord Blackburn in *Kemp v. Falk* (1882) 7 App. Ca. 573, 586.

(c) *Ex parte Cooper* (1879) 11 Ch. Div. 68, 73. If the cargo were one machine or the like in parts, and an essential part were delivered first, that

might be such a circumstance: *Ib.* at p. 75.

(d) Willes, J., *Bolton v. L. & Y. R. Co.* (1866) L. R. 1 C P., p. 440.

(e) *Dixon v. Yates* (1833) 5 B. & Ad. 313, 339, 341, 39 R. R. 489, 497, 499.

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is a question of fact to be determined with regard to all the circumstances, and on which precedents can be only suggestive. The phrase "delivery of part of a cargo made in the progress of and with a view to the delivery of the whole" occurs in Lord Tenderden's judgment in *Bunney v. Poyntz*, on which Illustration (b) is founded.

Illustration (c) is somewhat obscure to the modern reader until the case on which it was founded is consulted. It seems hopelessly unarguable that a subsale of part by B., the original buyer, to C., and delivery to C., at B.'s request, from A.'s warehouse, should operate as a constructive delivery of the remaining forty maunds from A. to B., or in any way affect A.'s rights as unpaid vendor with respect to them. Such an argument was, however, put forward more than eighty years ago on similar facts (*f*); but even then the subsale and delivery under it were relied on rather "upon the ground that the vendee treated the goods as his own" (*g*), with the consent of the vendor, than because of any supposed intrinsic virtue of part delivery. The Court did not think it necessary to hear the defendant's counsel on either branch of the argument. Whichever way it was considered, the dealing with part could not be presumed to have any reference to the whole, nor could the seller be presumed to intend to abandon any right as to the residue. There was also a question of the effect of paying warehouse rent (see p. 495, above).

It may, perhaps, be worth while to observe that a decision under the Statute of Frauds in England that an acceptance of part of goods ordered where the contract included several classes of goods, made the contract enforceable as to all the goods contracted for, and not only as to the class to which the parcel accepted belonged (*h*), has nothing to do with the effect of part delivery as regards the seller's lien or right to stop in transit either at common law or under the present Act in India. It certainly does not decide that the fact of a cargo sold at one time containing goods of several kinds might not strengthen the presumption against a delivery of part of the cargo, consisting of goods of one kind only, being intended to operate as a delivery of the whole.

(*f*) *Miles v. Gorton* (1834) 2 Cr. & 507, 39 R. R. 823.

M. 504; 39 R. R. 820.

(*h*) *Elliott v. Thomas* (1838) 3 M. &

(*g*) *Follett arguendo*, 2 Cr. & M. W. 170; 49 R. R. 558.

Seller not bound to deliver until buyer applies for delivery.

93.—In the absence of any special promise, the seller of goods is not bound to deliver them until the buyer applies for delivery. Ss. 91

Buyer's duty to apply for delivery.—There is really no distinct authority on this point in English law. The framers of the Sale of Goods Act assumed the rule to be “that it was for the buyer to take delivery, and that, in the absence of any different agreement, the duty of the seller to deliver was satisfied by his affording to the buyer reasonable facilities for taking possession of the goods at the agreed place of delivery” (i).

A buyer of goods made an assignment of the benefit of his contract which was found to be fictitious; he afterwards took a reassignment and sued on the contract. He was held not entitled to adopt a demand for delivery, which the nominal assignee had made in the meantime, as a demand made on the buyer's account, as required by this section (j).

94.—In the absence of any special promise as to delivery, goods sold are to be delivered at the place at which they are at the time of the sale; and goods contracted to be sold are to be delivered at the place at which they are at the time of the contract for sale, or if not then in existence, at the place at which they are produced.

Place of delivery.—There was no definite English authority on this point before the Sale of Goods Act, s. 29, which has enacted that, if there is no special agreement, “the place of delivery is the seller's place of business, if he have one, and if not, his residence,” unless the contract is for specific goods which to the knowledge of the parties are at some other place. This appears to be an improvement. The present section correctly represents what was understood to be the law, and is current in English and American books of repute.

(i) Chalmers, Sale of Goods Act, 67, 68.

(j) *Mulji v. Nathubhai* (1890) 15 Bom. L.

ss. 94, 95. A contract for the sale of goods "to be delivered at any place in Bengal... to be mentioned hereafter" does not fall within the operative part of this section, for there is a special promise as to delivery, giving the buyer the right to fix the place anywhere in Bengal, and the words "to be mentioned hereafter" express only what the law would have implied, that the seller is entitled to reasonable notice of the buyer's choice. The case rather resembles that which is contemplated in s. 49. There was, in fact, no question under that section, as the buyers had demanded delivery at the Howrah railway station, and the sellers had refused it (*k*).

Distinction between contract of sale of goods and contract to deliver goods in payment of debt.—A contract of sale differs from a contract to pay an existing debt in specific articles (which is strictly not payment, but accord and satisfaction). In the latter case, where no place of delivery is specially appointed, or is to be inferred from usage of trade or the nature of the thing, it is the duty of the debtor first to request the creditor to appoint a place, whereupon the creditor must appoint a place which is reasonable; if he does not, the debtor himself may name a reasonable place, giving notice to his creditor, and a tender of the property at that place will be good. So also where the time of delivery is fixed, although the place is not, the same rule applies (*l*).

Delivery of goods in sea transit.—The Act does not deal with the delivery, sometimes called symbolic, of goods in course of transit at sea by means of the bill of lading, or the conditions under which the buyer must pay against the shipping documents or is entitled to await actual delivery of the goods (*m*).

Seller's Lien.

95.—Unless a contrary intention appears by the contract, a seller has a lien on sold goods as long as they remain in his possession and the price or any part of it remains unpaid.

Seller's lien.

(*k*) *Grenon v. Lachmi Narain* (1896) 24 Cal. 8; I. R. 23 Ind. Ap. 119.

(*l*) Per Couch, C.J., in *Dadabhai v. Sallemann* (1868) 5 B.H.C.A.C. 126, 128.

(*m*) See *E. Clemens Horst Co. v. Biddell Bros.* [1912] A. C. 18, adopting

Kennedy, L.J.'s dissenting judgment in *C. A.* [1911] 1 K. B. at p. 952.

Seller's lien—This and the next group of sections deal with the rights of an unpaid seller first to hold the goods as security for the price before he has parted with possession, secondly to stop the goods as against an insolvent buyer while the goods, having left the seller's possession, are not yet in buyer's. The first of these rights is called, though inadequately, lien ; the second is the right to stop in transit. The Contract Act has wisely substituted an English form for the Latin *in transitu*, which is still current in English books, and is retained in the Sale of Goods Act. Considerable analogy will be found between these rights, and, in fact, they are often confused or insufficiently distinguished in the earlier reported cases ; but there are also material distinctions to be observed.

For the general principles of the subject there is still no better introductory statement than the following classical passage from a judgment of Bayley, J., delivered in 1825 (a):—

“ Where goods are sold, and nothing is said as to the time of the delivery, or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price ; but the buyer has no right to have possession of the goods till he pays the price. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment of or tender of the price is a condition precedent on the buyer's part ; and until he makes such payment or tender he has no right to the possession. If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him ; but his right of possession is not absolute ; it is liable to be defeated if he becomes insolvent before he obtains possession” : *Tooke v. Hollingworth* (a).

(a) *Bloxam v. Sanders*, 4 B. & C. p. 948 ; 28 R. R. 525.

(a) (1793) 5 T. R. 215 ; 2 R. R. 573. It is not thought useful to give any specific account of this case, in which the facts were somewhat complicated. In

Benjamin on Sale it is merely referred to in notes. Lord Blackburn did not cite it at all ; his editor, Mr. Graham, mentions it in a supplemental chapter of his own for a quite different purpose.

s. 95, 96. An unpaid seller's lien depends on actual possession and not on title, and is not affected by his having parted with a document capable of transferring title. He may have given a bill of lading which passes the legal property in the goods, or he may have given a delivery order which, though it does not pass the legal title or property in the goods, enables the person receiving it to acquire possession of the goods and acquire a title in that way, but whatever he has done in that respect does not destroy his right of lien as long as he keeps possession of the goods as vendor, and in no other character (*p*). Accordingly it has been held in India that the giving a delivery order by a vendor to a vendee does not of itself give the vendee such a possession of the goods as to defeat the vendor's lien for the price (*q*). But the vendor's lien may be defeated where the circumstances of a case are such as to estop the vendor from denying that payment had been received for the goods to which the delivery order related (*r*).

A seller is unpaid not only if the whole or part of the price has not been in any way paid or tendered, but if he has taken bills of exchange or other negotiable instruments as conditional payment, and the buyer has failed to meet them at maturity. And where payment by acceptance of bills or the like is stipulated for, it is presumed to be conditional on the bills being duly met. The English law on this point was thus stated by Mellish, L.J.: "No doubt if the buyer does not become insolvent then credit is given by taking the bill, and during the time that the bill is current there is no vendor's lien, and the vendor is bound to deliver. But if the bill is dishonoured before delivery has been made, then the vendor's lien revives" (*s*). Compare s. 99 (*p*. 510 below) on stoppage in transit, and the authorities there cited.

96.—Where, by the contract, the payment is to be made at a future day, but no time is fixed for the delivery of the goods, the seller has no lien, and the buyer is entitled to a present delivery of the goods without payment. But if the

Lien where payment to be made at a future day but no time fixed for delivery.

(*p*) *Imperial Bank v. London and St. Katherine Docks Co.* (1877) 5 Ch. Div. 195, 200, *per* Jessel, M.R.

(*q*) *Le Geyt v. Harvey* (1884) 8 Bom. 501.

(*r*) *Anglo-India Jute Mills Co. v. Omdemull* (1910) 38 Cal. 127.

(*s*) *Ounn v. Bolckow, Vaughan & Co.* (1875) L. R. 10 Ch. 491, 501, where the principal rule is declared as settled law.

buyer becomes insolvent before delivery of the goods, or if the time appointed for payment arrives before the delivery of the goods, the seller may retain the goods for the price.

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Explanation.—A person is insolvent who has ceased to pay his debts in the usual course of business, or who is incapable of paying them.

“Insolvency”
defined.

Illustration.

A. sells to B. a quantity of sugar in A.'s warehouse. It is agreed that three months' credit shall be given. B. allows the sugar to remain in A.'s warehouse. Before the expiry of the three months B. becomes insolvent. A. may retain the goods for the price.

§ 7. Seller's lien where the sale is on credit.—“Where the owner of goods sells on credit, the buyer has a right to immediate possession; but if he suffer the goods to remain until the period of payment has elapsed, and no payment in fact is made, then the seller has a right to retain them. There is no difference in principle whether the seller charges the buyer with a rent or not. They are still in his possession” (t). This holds whether the buyer is actually insolvent or not (u).

It will be observed that the buyer's insolvency puts an end to his right to claim delivery even where the sale is on credit and the term of credit has not yet expired. (See the English authorities cited on s. 95, pp. 503, 504, above.)

A sale is on credit when the seller agrees to accept payment at a future date, and there is nothing to show that the buyer is not entitled to immediate delivery. “It is...undoubted law that by a sale of specific goods for an agreed price the property passes to the buyer

Bunney v. Poyntz (1833) 4 B. & Ad. 568; 38 R. R. 309, can be supported only as applicable to the case of a negotiable instrument treated as payment in full, see *Re J. Defries & Sons* [1909] 2 Ch. 423.

(t) Judgment of Bayley, J., in *New v. Swain* (1828) Danson and Lloyd, 193 (this is a rare volume of mercantile cases, containing some not reported elsewhere); 34 R. R. 767. This was not a

Nisi Prius decision, as stated in Chalmers on the Sale of Goods Act, p. 82, note 2, following Blackburn on Sale, p. 324, and Benjamin, 5th ed. 827; a strange mistake to have been made and repeated by three very accurate writers in succession.

(u) The error mentioned in the last note led Lord Blackburn to think this point unsettled.

8. 96. and remains at his risk, . . . and it is equally clear law that where by the contract the payment is to be made at a future day, the lien for the price which the vendor would otherwise have is waived, and the purchaser is entitled to a present delivery of the goods without payment, upon the ground that the lien would be inconsistent with the stipulation in the contract for a future day of payment." Accordingly, where specific goods were sold "to be paid for by cash in one month less 5 per cent. discount," this was held to be a sale on a month's credit, and not a sale for ready money with a month's grace (*v*). In the same case evidence of a custom in the particular trade that the sellers were not bound to deliver without payment was rejected as contrary to the terms of the contract; but on this point the decision was afterwards overruled (*w*).

The text of the Act throws no light on the position in this respect of a seller who has assented to hold the goods as bailee for the buyer (see on s. 90, p. 490, above). It may be logically argued that by ceasing to possess in his original character, and agreeing to possess on the buyer's account, he has abandoned his lien; and this reason was allowed by English authorities before 1893 when the buyer was merely in default (*x*); but if the buyer was insolvent the right of lien was held to revive (*y*). A striking instance of the operation of this last rule will be found in a case that came before the Judicial Committee of the Privy Council. The appellants, who traded in Australia, imported three parcels of tea which they sold to the respondents, who gave their acceptances or promissory notes for the price. The appellants were also warehousemen having a bonded warehouse, in which they had stored the tea on its importation. On selling the tea to the respondents the appellants handed them delivery orders, each of which stated that the tea to which it referred was warehoused by the appellants. The delivery orders were subsequently indorsed by the respondents to W. & Co., and entries were made at the warehouse that the tea had been

(*v*) *Spartali v. Bencke* (1850) 10 C. B. 212; 84 R. R. 532.

(*w*) *Field v. Lelean* (1861) in Ex. Ch., 6 H. & N. 617; 123 R. R. 729.

(*x*) *Cusack v. Robinson* (1861) 1 B. & S. 299, judgment of Court delivered by Blackburn, J.

(*y*) *Townley v. Crump* (1835) 4 Ad. &

E. 58; 43 R. R. 300, where it is treated as already clear that "a vendor who is himself the warehouseman" does not lose his rights against a buyer who afterwards becomes bankrupt merely by giving him a delivery order; *Grice v. Richardson* (1877) 3 App. Ca. 319.

transferred to W. & Co. Subsequently W. & Co. became insolvent and their acceptances and notes were dishonoured, by which time part of the tea had been delivered to W. & Co. and part remained in the warehouse, for which the appellants had not been paid. *Held*, that the appellants as vendors retained their lien in respect of the tea which remained in the warehouse (z). The Sale of Goods Act, 1893, s. 41 (2), has affirmed the seller's right of lien, "notwithstanding that he is in possession of the goods as agent or bailee for the buyer" without any distinction. *Quære* whether the Indian High Courts would now hold themselves bound to follow the earlier English decisions in the case of default without insolvency.

97.—Where, by the contract, the payment is to be made at a future day, and the buyer allows the goods to remain in the possession of the seller until that day and does not then pay for them, the seller may retain the goods for the price.

Seller's lien where payment to be made at future day, and buyer allows goods to remain in seller's possession.

Illustration.

A. sells to B. a quantity of sugar in A.'s warehouse. It is agreed that three months' credit shall be given. B. allows the sugar to remain in A.'s warehouse till the expiry of the three months, and then does not pay for them [sic]. A. may retain the goods for the price.

Seller's lien where the price is to be paid at a future day.—This section manifestly overlaps s. 96, and it is not easy to see why they were drawn as separate sections in this manner. In the English Sale of Goods Act the treatment is much more clear and satisfactory.

The seller's lien is available so long as he holds any part of the goods; and even where the contract is for delivery and payment by distinct instalments, and the buyer becomes insolvent in the course of performance of the contract, the seller need not deliver any more goods without payment in full. "He is entitled to refuse to deliver any more till he is paid the debt due for those already delivered, as well as the price of those still to be delivered" (a). But the trustee in

(z) *Grice v. Richardson*, last note. 8 Ch. 289.

(a) *Ex parte Chalmers* (1873) L. R.

8. 97. bankruptcy of a bankrupt purchaser, and it seems also a sub-purchaser, may elect to fulfil the contract by tendering the price in full within a reasonable time, although the seller is not bound to tender the goods (b).

Effect of buyer's insolvency before completion of contract.—It is well settled that default in payment does not of itself rescind or entitle the seller to rescind the contract. The buyer may put an end to the seller's lien and entitle himself to delivery by payment or tender of the price within a reasonable time. "In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement" (c).

Even the buyer's insolvency does not operate, without more, as a rescission. For the benefit of the contract vests in the official assignee (d), and it may still be possible and proper to complete the contract for the benefit of his creditors. But conduct on the part of the insolvent and his trustees which "practically give notice to his creditors and those with whom he has contracted that he does not mean to pay any of his debts or perform any of his contracts" may amount to a refusal of performance entitling the seller to rescind (see s. 39, p. 277, above) (e). If the seller does not elect or is not entitled to rescind, he has his remedy against the bankrupt buyer's estate for any damage suffered by the breach of contract (f).

The seller is not entitled to treat the buyer as insolvent merely because he is in some temporary embarrassment. It must appear by his own admission or by other sufficient proof that he is unable to pay the price in due or reasonable time, and therefore does not expect or intend to pay it (g).

(b) *Ex parte Stapleton* (1879) 10 Ch. Div. 586; *Grey v. Lamond Walker* (1913) 40 Cal. 523, 531—533. And see *Kemp v. Falk* (1882) 7 App. Ca. at p. 578, where Lord Selborne expressed the opinion that a sub-purchaser would have this right.

(c) *Martindale v. Smith* (1841) 1 Q. B. 389; 55 R. R. 285.

(d) *Jaffer Meher Ali v. Budge-Budge Jute Mills Co.* (1907) 34 Cal. 289.

(e) *Ex parte Chalmers* (1873) L. R.

8 Ch. at pp. 293, 294, per Mellish, L. J. Rather slight evidence of the seller's intention to do so is enough; *Morgan v. Bain* (1874) L. R. 10 C. P. 15, 27, per Brett, J.; *Jiwan Vurjung v. Haji Osman Haji Oomar* (1903) 5 Bom. L.R. 373.

(f) *Boorman v. Nash* (1829) 9 B. & C. 145; 32 R. R. 607; and see note there.

(g) *Re Phoenix Bessemer Steel Co.* (1876) 4 Ch. Div. 108.

98.—A seller, in possession of goods sold, may retain them for the price against any subsequent buyer, unless the seller has recognised the title of the subsequent buyer. S. 98.

Seller's lien
against subsequent
buyer.

Lien against subsequent buyer.—A. is the owner of specific goods lying in N.'s warehouse and held by N. on A.'s account. A. sells these goods to B. and takes from B. a bill of exchange for the price, and hands B. a delivery order addressed to N. B. resells the goods to C. and gives C. the delivery order. Before C. can obtain possession of the goods B. has become insolvent, and A. has warned N. not to deliver to any one without A.'s order. A. has not lost his lien on the goods, and can hold them as against C. (h).

It was laid down as early as 1833 that, as regards an unpaid seller's rights, "a second vendee of a chattel cannot stand in a better situation than his vendor" (i). But if the original seller recognises the title of a subsequent buyer without reserving his own rights he is estopped from claiming a lien, and the subsale may even take effect by way of estoppel, notwithstanding that no specific goods have been appropriated as between the seller and the first buyer.

A. sells B. eighty maunds of grain out of a larger quantity lying in his granary; B. sells sixty maunds out of these (the goods not being yet ascertained) to C. Then C., having a delivery order from B., forwards it to A., who informs C. that he will send the grain in due course. If B. now becomes insolvent A. cannot refuse to deliver sixty maunds to C., though he may retain the remaining twenty as against B. (j). The rule has nothing to do with constructive delivery; the ground is estoppel by the seller's conduct amounting to an assurance to the subsequent buyer that the goods are at his disposal free from any adverse claim by the seller.

(h) *Mc Ewan v. Smith* (1849) 2 H. 39 R. R. 489, 497. The real question in the case was whether the dealings with the goods amounted to a delivery to the subsequent buyer.

(j) *Knights v. Wiffen* (1870) L. R. 5 Q. B. 660. In the earlier case of *Woodley v. Corentry* (1863) 2 H. & C. 164, the facts are almost identical.

(i) *Dixon v. Yates*, 5 B. & Ad. 313;

S. 99.

Stoppage in Transit.

99.—A seller who has parted with the possession of the goods, and has not received the whole price, may, if the buyer becomes insolvent, stop the goods while they are in transit to the buyer.

Power of seller to stop in transit.

Stoppage in transit.—An interesting account of the earlier history of this right in English reported cases may be found in the judgment of Lord Abinger, C.B. (the value of which for this purpose is not affected by the fact that it was a dissenting one), in *Gibson v. Carruthers* (k), which is extracted and supplemented by some very valuable remarks in Lord Blackburn's book (l). We cannot, however dwell on this here.

The present group of sections appears to reproduce English law without variation. S. 103 made an innovation at the time by extending the operation of a bill of lading against stoppage in transit to other instruments of title. This has now been done in England by s. 10 of the Factors Act, 1889, and s. 47 of the Sale of Goods Act, 1893.

Conditions under which right of stoppage in transit may be exercised.—In order that the right to stop goods in transit may be exercisable, the following conditions must all be satisfied: The seller must be unpaid; the buyer must be insolvent; the seller must have parted with the possession of the goods; and the buyer must not have acquired it. This last condition, as we shall see under the next section, is that which is shortly expressed by saying that the goods are in transit.

A seller is unpaid so long as he "has not received the whole price." Payment of part does not affect his right. As long ago as 1797 it was decided that "the circumstances of the vendee having partly paid for the goods does not defeat the vendor's right to stop them *in transitu*, the vendee having become a bankrupt. . . . The vendor has a

(k) (1841) 8 M. & W. 321; 58 R. R. 713. may or may not have intended to administer a cosmopolitan law merchant.

(l) Blackburn on Sale, Part III. It does appear, however, that equity was before common law in recognising the doctrine. *Wiseman v. Vandeput* (1890) 2 Vern. 203, is not well reported. The Court

right to retake them unless the whole price has been paid" (*m*). Again, he is not the less unpaid because he sold the goods on credit and the term of credit has not expired at the dates of the buyer's insolvency and the stoppage, nor because he has taken the buyer's acceptances as conditional payment, which is only one form of giving credit (*n*). S. 99.

The general rule that the giving of a negotiable instrument operates only as conditional payment may be excluded if the intention of the parties is to treat it as a final discharge of the debt, leaving the creditor to his remedies on the bill (*o*), and a seller who has thus taken a negotiable security as an absolute payment is no longer an unpaid seller and cannot exercise the right of stoppage in transit (*p*). It is a question of fact whether the parties intended the taking of the negotiable instrument to operate as an absolute payment.

Title to seller's rights.—According to the terms both of this Act and of the English Sale of Goods Act, the right to stop in transit belongs to an unpaid seller "who has parted with the possession of the goods." But there is undisputed English authority for extending it, in some circumstances, to a seller who has never had possession or the right to possess any ascertained goods, but has only acquired the right to take a certain proportion of an entire bulk. A. consigned a cargo to Z. in London, exceeding the quantity which Z. had contracted to take, and drew two bills on Z., one for the price of the quantity contracted for, the other for the residue. Z. accepted the first bill and refused to accept the second. It was then agreed that B., who was A.'s London agent, should himself take the smaller portion, and this agreement, as the Court held, "gave the right to [Z.] to take possession of and receive their proportion on the ship's arrival, and to [B.] a right to receive the residue." B. sold his interest in the cargo to P., taking P.'s bill; P. pledged it to Q. Before the ship arrived P. failed, and his bill was dishonoured. There was only one bill of lading, which was held by Z.; P. had only a delivery order addressed

(*m*) *Hodgson v. Loy* (1797) 7 T. R. 440; 4 R. R. 483.

(*n*) *Feise v. Wray* (1802) 3 East, 93; 6 R. R. 551; *Edwards v. Brewer* (1837) 2 M. & W. 375; 46 R. R. 626; *cp. Gunn v. Bolckow, Vaughan & Co.* (1875) L. R. 10 Ch. 491, 501 (on lien).

(*o*) *Chalmers on Bills of Exchange*, 7th ed. 342.

(*p*) *Cowasjee v. Thompson* (1845) 3 M. J. A. 422; *S. C.*, 5 Moore, P. C. 165; 70 R. R. 27 (option to pay in cash or bills).

ss. 99, 100. to the captain. B. notified the captain not to deliver his share of the cargo to any one without further instructions. *Held*, that B. was entitled to stop his proportion of the cargo in transit, and had effectually done so as against Q. (q). This case was decided by a strong Court, and appears to be very good authority. Sir M. Chalmers cites it with the observation, "The Courts show a strong inclination to give the rights of an unpaid seller against the goods to any one whose position can be shown to be substantially analogous to that of an ordinary seller" (r); and as neither the English nor the Indian Act has any words excluding persons in such a position from the like rights with those expressly confirmed to the unpaid seller, there does not seem to be anything to prevent the Courts from continuing to follow the same course in either country.

A merchant who buys on his own credit for another to whom he indorses the bill of lading is in the position of a seller for the purpose of stoppage in transit (s).

In the case of a surety for the buyer who has paid the seller his right to stand in the seller's place appears to be included in "all the rights which the creditor had against the principal debtor," to which he is expressly entitled under s. 140 (p. 598 below). The corresponding rule is now settled in England (t).

100.—Goods are to be deemed in transit while they are in the possession of the carrier, or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged.

When goods are to be deemed in transit.

(q) *Jenkyns v. Usborne* (1844) 7 Man. & G. 678; 66 R. R. 767, judgment of Court of C. P. per Tindal, C.J.

(r) The Sale of Goods Act, p. 79.

(s) *Feise v. Wray* (1802) 3 East, 93; 6 R. R. 551; *The "Tigress"* (1863) Br. & L. 38; 32 L. J. Adm. 97. This does not make the relation of the parties

equivalent to that of buyer and seller for other purposes: *Cassaboglou v. Gibbs* (1883) 11 Q. B. Div. 797, 806, per Fry, L.J.

(t) *Imperial Bank v. London and St. Katharine Docks Co.* (1877) 5 Ch. D. 195.

Illustrations.

S. 10

(a) B., living at Madras, orders goods of A. at Patna, and directs that they shall be sent to Madras. The goods are sent to Calcutta, and there delivered to C., a wharfinger, to be forwarded to Madras. The goods, while they are in the possession of C., are in transit.

(b) B., at Delhi, orders goods of A. at Calcutta. A. consigns and forwards the goods to B. at Delhi. On arrival there, they are taken to the warehouse of B. and left there. B. refuses to receive them, and immediately afterwards stops payment. The goods are in transit. [*James v. Griffin* (1836) 1 M. & W. 20; 46 R. R. 243; *Bolton v. L. & Y. R. Co.* (1866) L. R. 1 C. P. 431.]

(c) B., who lives at Puna, orders goods of A. at Bombay. A. sends them to Puna by C., a carrier appointed by B. The goods arrive at Puna, and are replaced by C., at B.'s request, in C.'s warehouse for B. The goods are no longer in transit. [Settled law: *Whithead v. Anderson* (1842) 9 M. & W. 518; 60 R. R. 819; and see Parke, B.'s judgment in *James v. Griffin* cited below.]

(d) B., a merchant of London, orders 100 bales of cotton of A., a merchant at Bombay. B. sends his own ship to Bombay for the cotton. The transit is at an end when the cotton is delivered on board the ship. [And it makes no difference that B.'s ship is employed by him as a general ship: *Schotsmans v. L. & Y. R. Co.* (1867) L. R. 2 Ch. 332.]

(e) B., a merchant of London, orders 100 bales of cotton of A., a merchant at Bombay. B. sends his own ship to Bombay for the cotton. A. delivers the cotton on board the ship, and takes bills of lading from the master, making the cotton deliverable to A.'s order or assigns. The cotton arrives at London, but, before coming into B.'s possession, B. becomes insolvent. The cotton has not been paid for. A. may stop the cotton. [In this case there is, unless a contrary intention distinctly appears, only a conditional appropriation of the goods to the contract. See the authorities cited under s. 83, p. 474, above. The master of B.'s ship, therefore, holds the goods only as a carrier, and not as B.'s agent. Where the condition to be fulfilled by the buyer is accepting a bill drawn against the goods, his acceptance while the goods are in transit makes him the owner of the goods, but does not make the carrier hold as his agent or servant. See *Cahn v. Pockett's Bristol, etc., Co.* [1899] 1 Q. B. 643, C. A., where the discussion of principles is instructive. The actual decision was on a point of some difficulty under s. 25 of the Sale of Goods Act.]

English authorities.—The principle here laid down is very well settled in England law, and it will suffice here to quote a few of the most authoritative expositions in order of date:—

1836, Baron Parke, *James v. Griffin*, 2 M. & W. at p. 632; 46 R. R. at p. 253: "The delivery by the vendor of goods sold to a carrier

§. 100. of any description, either expressly or by implication named by the vendee, and who is to carry on his account, is a constructive delivery to the vendee; but the vendor has a right if unpaid, and if the vendee be insolvent, to retake the goods before they are actually delivered to the vendee, or some one whom he means to be his agent to take possession of and keep the goods for him, and thereby to replace the vendor in the same situation as if he had not parted with the actual possession.....The actual delivery to the vendee or his agent, which puts an end to the *transitus* or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods: *Scott v. Pettit (u)*, *Rowe v. Pickford (v)*; or at a place where he means the goods to remain until a fresh destination is communicated to them by orders from himself: *Dixon v. Baldwin (w)*; or it may be by the vendee's taking possession by himself or agent at some point short of the original intended place of destination."

1842, Court of Exchequer, judgment by Parke, B., *Whitehead v. Anderson*, 9 M. & W. at p. 534; 60 R. R. at p. 833: "The law is clearly settled that the unpaid vendor has a right to retake the goods before they have arrived at the destination originally contemplated by the purchaser unless in the meantime they have come to the actual or constructive possession of the vendee. If the vendee take them out of the possession of the carrier into his own before the arrival, with or without the consent of the carrier, there seems to be no doubt that the transit would be at an end.... This is a case of actual possession, which certainly did not occur in the present instance (*x*). A case of constructive possession is where the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee or his agent, not for the purpose of expediting them to the place of original destination pursuant to that contract, but in a new character, for the purpose of

(u) (1803) 3 B. & P. 469; 7 R. R. 804.

(v) (1817) 8 Taunt. 83; 19 R. R. 466.

(w) (1804) 5 East, 175; 7 R. R. 681.

It is not thought necessary to give a specific account of any of these cases.

(x) The assignees of the bankrupt buyer had made an unsuccessful attempt

to obtain actual possession by seeing and touching some of the cargo on board. The captain refused to deliver or to waive his lien for the freight, and afterwards received a notice of the stoppage in transit from the seller and delivered to the seller's agent.

custody on his account, and subject to some new or further order to be given to him." S. 100.

1867, Lord Chelmsford, L.C., *Schotsmans v. Lancs. & Yorks. R. Co.*, L. R. 2 Ch. at pp. 335, 336: "If the goods are actually delivered to an agent of the vendee employed by him to receive delivery, the vendor is divested of his right of stoppage *in transitu*. On the other hand, although there is an actual delivery to the vendee's agent, the vendor may annex terms to such delivery, and so prevent it from being absolute and irrevocable. . . . If the vendor desires to protect himself, he may . . . preserve his right of stoppage *in transitu* by taking bills of lading, making the goods deliverable to his order or assigns."

Cairns, L.J., *ib.* at p. 338: "The essential feature of a stoppage *in transitu*. . . is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with and the purchaser who has not yet received them."

1879, James, L.J., *Ex parte Cooper*, 11 Ch. D. at pp. 77, 78 (after the several members of the Court had given judgment on the special facts): "I think that our decision, in which we are unanimous, may be expressed thus: When goods are placed in the possession of a carrier to be carried for the vendor, to be delivered to the purchaser, the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent. Of course, the same principle will apply to a warehouseman or a wharfinger."

1879, James, L.J., *Ex parte Rosevear China Clay Co.*, 11 Ch. D. at p. 568: "The authorities show that the vendor has a right to stop *in transitu* until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. . . . The principle is this: that when the vendor knows that he is delivering the goods to some one as carrier, who is receiving them in that character, he delivers them with the implied right, which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier."

Cotton, L.J., *ib.* at pp. 571, 572: "I think it is clearly established that so long as goods are in the hands of a carrier as carrier they are

- S. 100.** not in the actual possession of the purchaser, whoever may have nominated the carrier. The contract with a carrier to carry goods does not make the carrier the agent or servant of the person who contracts with him, whether he be the vendor or the purchaser of the goods. . . . Here the contract was that the goods were to be placed on board (y) by the vendors, not by the purchaser. The purchaser was to indicate where the goods were to go, and only when they reached that destination would they come into his actual possession."

1887, *Cave, J., Bethell v. Clark*, 19 Q. B. D. at p. 561 (goods sent by seller to ship named by buyer; no bill of lading; buyer had receipt from ship's mate; did nothing with it: *Held*, that the goods were in transit during the voyage): "In all cases of stoppage *in transitu*, it is necessary first of all to ascertain what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser the *transitus* begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles."

1888, Lord Esher, M.R. (same case on appeal), 20 Q.B.D. at p. 617: "When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purpose of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh

(y) The ship was chartered by the purchaser, but there was no contract to deliver on board any particular ship.

transit had begun. The way in which that question has been dealt with is this : Where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists ; but if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such a transit is no part of the original transit, and the right to stop is gone. So also if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at an end when they have reached that place, and any further transit is a fresh and independent transit.”

1890, Lord Herschell, delivering the judgment of the Judicial Committee, *Lyons v. Hoffnung*, 15 App. Ca. at pp. 396, 397 (buyer at Sydney instructed seller's agent to send the goods when packed and marked to a named wharf in Sydney. He said the goods were going with him. Receipts were given by the shipowners describing Hoffnung & Co., the sellers as the shippers, Clare, the buyer, as the consignee, and Kimberley (z) as the place of destination. Clare became insolvent after the goods left Sydney and before they arrived at Kimberley, and Hoffnung & Co. stopped the goods. It did not appear whether Clare did or did not in fact sail in the same ship, but their Lordships clearly held it not material) : “ The goods at the time of the purchase were undoubtedly intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier to be carried to a destination intimated by the purchaser to the vendors at the time of the sale, because, although the language used by Clare according to his evidence was that he was going to Kimberley and going to take these goods with him, that language must be interpreted according to the ordinary course of business as it would be understood by business men ; and it is obvious that Clare was not going to take these goods with him in any other sense than that he intended himself to be a passenger by the vessel on which they were to be shipped and by which they were to be carried, his intention being that the goods should be shipped on board that vessel as cargo in the ordinary

(z) Presumably Kimberley in Western Australia.

0. way, carried by carriers to their destination, and there delivered to him.

“ These circumstances appear to their Lordships sufficient to indicate that the right to stop *in transitu* existed.....The law appears to their Lordships to be very accurately and clearly laid down by the Master of the Rolls in the case of *Bethell v. Clark*.” (See p. 516, above).

The result of the English authorities as to the persistence or determination of the transit in several classes of cases is summed up by s. 45 of the Sale of Goods Act, 1893, which see in Appendix. It must be observed that it is really a question of fact, depending on the intention of the parties, whether dealings with goods at this or that point, say at a port of embarkation after a railway journey, are the end of a first transit to be followed by a new one, or only an incident in one continuous transit. The fact that directions for forwarding are given by the buyer may co-exist with a contract leaving him no option as to the ultimate destination, and therefore with a continuing transit (a); on the other hand, delivery to a commission agent for the ultimate buyer, such an agent being himself the buyer as regards the original seller, may show that the transit is at an end (b).

Indian authorities.—Indian authorities have closely followed on the lines marked out by the English Courts. In *G. I. P. Ry. Co. v. Hanmandas* (c) goods were delivered by the vendor to a railway company for conveyance to their place of destination; it was held that the transit determined on payment of freight to the company by an indorsee of the railway receipt for the goods from the purchaser, and on his loading the goods in his carts, and that the company had no right to stop the goods on behalf of the unpaid vendor on notice from him of the buyer's insolvency, merely because the carts had not then left the goods compound of the railway station.

(a) *Ex parte Watson* (1877) 5 Ch. Div. 35.

(b) *Ex parte Miles* (1885) 15 Q. B. Div. 39. The remark of Brett, M. R., *ad fin.* at p. 47, is instructive (leave had been asked to appeal to the House

of Lords): “ If there was a question of law, we might consider it, but it is only a question of fact.”

(c) (1889) 14 Bom. 57. The facts of this case are much like those of *Ex parte Gibbs* (1875) 1 Ch. D. 101.

Any tortious act of the carrier after the goods are "at home," such as delivery to a person purporting to claim under the unpaid seller's authority, but not having authority in fact, cannot defeat the purchaser's right (*d*). Nor, on the other hand, does a mistaken or otherwise wrongful delivery of goods by the carrier after notice to stop in transit defeat the right of the unpaid vendor (*e*). 8a.
100, 10

Public Wharves.—The effect of landing goods at wharves belonging to public bodies like the "Trustees of the Port of Bombay," constituted by Bombay Act VI of 1879, was considered by Farran, J., in *Lilladhar v. George Wreford* (*f*), where the learned judge, after citing *Barber v. Meyerstein* (*g*) and *Glyn, Mills & Co. v. East and West India Dock Co.* (*h*), proceeded to say: "From this it would seem to follow that, so long as they [the goods] are subject to a lien for freight, the transit has not ended. The goods are not at home. The converse proposition would, however, seem also to be true that when the shipowner lands the goods under the statute, and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the statutable wharfingers for the consignee alone."

101.—The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the Continuan- of the right of stoppage. buyer's reselling the goods while in transit, and receiving the price, but continues until the goods have been delivered to the second buyer, or to some person on his behalf.

This rule has been settled for more than eighty years (see the well known case of *Dixon v. Yates*, decided in 1833) (*i*). As Lord Blackburn says, a purchaser who has acquired ownership "may sell the

(*d*) *Bird v. Brown* (1850) 4 Ex. 786; 89, where the plaintiff's name is mis-
80 R. R. 775, cited in *Lilladhar v. George Wreford* (1892) 17 Bom. 62, 88. Authority cannot be conferred by ratification unless the principal could have effectively authorised the act when done. See on s. 196, p. 682 *sqq.*, below.

(*f*) (1892) 17 Bom. 62, 91, 92.

(*g*) (1870) L. R. 4 H. L. 317.

(*h*) (1882) 7 App. Ca. 591.

(*i*) 5 B. & Ad. 313; 39 R. R. 489. This was a case of vendor's lien, but the principles are throughout treated as identical.

(*e*) *Litt v. Cowley* (1816) 7 Taunt. 169; 17 R. R. 482, cited in *Lilladhar v. George Wreford* (1892) 17 Bom. 62,

Sec.
101, 102.

goods subject to the first vendor's rights, and if he does so the property is transferred to the second purchaser, by the second bargain and sale, without any delivery of possession. But though the second purchaser acquires by his bargain and sale the legal property in the goods, and every right which his immediate bargainer had in the goods, yet (if there be not an assignment of a bill of lading) [or other document showing title to the goods; see s. 102, below] he acquires no greater right; he takes the property subject to the same restrictions that his immediate vendor held it under " (j). The existence of this rule shows that, whatever the right to stop *in transitu* may once have been, it has not been in modern times a merely equitable right; for all equitable rights, being in their essence personal, are liable to be defeated by a purchaser of the legal estate or interest for value and without notice.

Under the next section we have the important exception from this rule where a bill of lading or other document of title has been assigned for value. Nothing short of this will prevent the application of the ordinary rule; for example, the existence of a bill of lading made out in the sub-purchaser's name, but not delivered to him, is not sufficient (k). Neither is any kind of agreement with a sub-purchaser, even with payment, unaccompanied by an indorsement of the bill of lading (l).

102.—The right of stoppage ceases if the buyer, having obtained a bill of lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer who is acting in good faith, and who gives valuable consideration for them.

Cessation of right
on assignment by
buyer of bill of
lading.

Illustrations.

(a) A. sells and consigns certain goods to B., and sends him the bill of lading. A. being still unpaid, B. becomes insolvent, and, while the goods are in transit, assigns the bill of lading for cash to C., who is not aware of his insolvency. A. cannot stop the goods in transit.

(j) Blackburn on Sale, 2nd ed. p. 386. Bom. 640.

(k) *Ex parte Golding, Davis & Co.* (l) *Kemp v. Falk* (1882) 7 App. Ca. (1880) 13 Ch. Div. 628; *Bapuji Sorabji* 573; see especially per Lord Blackburn *v. The Clan Line Steamers* (1910) 34 at p. 582.

(b) A. sells and consigns certain goods to B., A. being still unpaid. B. becomes insolvent, and, while the goods are still in transit, assigns the bill of lading for cash to C., who knows that B. is insolvent. The assignment not being in good faith, A. may still stop the goods in transit.

S. 102.

Rules of English law.—The common law rule has long been well settled. It has been said by a great Judge to make bills of lading negotiable in a limited sense “as against stoppage *in transitu* only” (*m*). The extension of the same effect to other documents of title is due to the Indian Legislative Department; it does not appear in the Law Commissioners’ original draft.

The present section would appear, in terms, to include the case of assignment to a second buyer where the sale is on credit, and the term of credit has not expired; for a solvent buyer’s promise is certainly a valuable consideration, and insolvency is not to be presumed. It is the better opinion in England that in such a case the right to stop in transit is defeated, and the original seller has not any substituted equitable right against the purchase-money, but there is no positive decision (*n*).

“Other documents showing title to the goods.”—See notes to s. 103 under the head “Other instrument of title to any goods.”

Bills of Lading Act.—The following two sections of the Bills of Lading Act IX of 1865 may be noted in this connection:—

“1. Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

(*m*) Willes, J., in *Fuentes v. Montis* (1868) L. R. 3 C. P. at p. 276.

(*n*) Lord Selborne in *Kemp v. Falk* (1882) 7 App. Ca. 573, 577; and see Chalmers on Sale of Goods Act, 87. *Ex parte Golding, Davis & Co.* (1880) 13 Ch. Div. 628, does not decide the contrary, for there the sub-purchaser never got the bill of lading, and the seller’s right to come upon the purchase-money

was in substitution for the right to stop the goods themselves, the contract with the sub-purchaser having been carried out by consent. But such a doctrine is more or less involved in the language of the judgments. The point is fully discussed by the learned editors of Benjamin on Sale, 5th ed., 921. The view more shortly expressed here is identical with theirs.

8s.
102, 103. "2. Nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

103.—Where a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically upon it, in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit.

Stoppage where bill of lading is pledged to secure specific advance.

Illustrations.

(a) A. sells and consigns goods to B. of the value of 12,000 rupees. B. assigns the bill of lading for these goods to C. to secure a specific advance of 5,000 rupees made to him upon the bill of lading by C. B. becomes insolvent, being indebted to C. to the amount of 9,000 rupees. A. is not entitled to stop the goods except on payment or tender to C. of 5,000 rupees.

(b) A. sells and consigns goods to B. of the value of 12,000 rupees. B. assigns the bill of lading for these goods to C. to secure the sum of 5,000 rupees due from him to C. upon a general balance of account. B. becomes insolvent. A. is entitled to stop the goods in transit without payment or tender to C. of the 5,000 rupees.

English authorities.—Both the illustrations to this section are suggested by the English case of *Spalding v. Ruding* (o). The first is covered by the decision there, and by other authorities, and is settled law in England; but what corresponds to the second in *Spalding v. Ruding* is a much more guarded proposition, namely, that the assignee of the bill of lading for a definite advance cannot, because he happens to be the insolvent buyer's factor, also claim to be satisfied for his general balance of account in priority to the seller's claim to stop *in transitu*. There is no such rule in English authorities as that a transfer of a bill of lading expressly to secure a balance of account, or any other existing debt, will not prevail over the right to stop in transit. Apparently the terms of the present section interpret *Spalding v. Ruding* in the light of the opinion of the Judicial Committee, in

(o) (1843) 6 Beav. 376; 63 R. R. 120.

1869, that a bill of lading given to secure an antecedent debt was not effectual against the unpaid seller (*p*) ; but the Court of Appeal in England has since held the contrary (*q*), not finding any principle or authority to support the novel distinction, as they considered it, introduced by the Judicial Committee. The words of the Act, however, are clear and consistent with the authorities as they stood when it was passed. Nothing short of a complete novation, it would seem, will exclude the unpaid seller's right in such a case.

Where the pledgee has other security besides the goods comprised in the bill of lading, the unpaid seller can call on him to resort to that security in relief of the goods in question or the purchase-money representing them (*r*).

The best judicial exposition of the general principle is in a judgment of Lord Blackburn's, which, for the present purpose, gives a sufficient view of the facts he was dealing with : " It appears that Mr. Falk, of Liverpool, had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo ; that bills of lading were made out, which were signed, not, as is usual, by the master, but by the ship-owner himself ; and that Mr. Kiell got those bills of lading. Now, so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange, had no right whatever to meddle with

(*p*) *Rodger v. Comptoir d'Escompte de Paris*, L. R. 2 P. C. 393 (Lord Chelmsford, Sir James Colville, Sir Joseph Napier).

(*q*) *Leask v. Scott* (1877) 2 Q. B. Div. 376 (Lord Coleridge, C.J., Bramwell and Brett, L.JJ.). This was clearly the stronger Court of the two on a question of mercantile law. The Sale of Goods Act merely requires that the transferee should take "in good faith and for valuable consideration." The real consideration, as pointed out in *Leask v. Scott*, is present forbearance on the creditor's part ; and forbearance coupled with a release was held sufficient by the Judicial Committee itself

in *Chartered Bank of India, etc. v. Henderson* (1874) L. R. 5 P. C. 501, distinguishing the former case on the ground that there was no specific pledge of the bill of lading in question, but a general demand of all the security the debtor could give. But it seems that under the Indian Act this last case would have to be decided the other way. These two decisions of the Judicial Committee were on appeals from Hong Kong arising out of the failure of the same firm.

(*r*) *Re Westrinthus* (1833) 5 B. & Ad. 817 ; 39 R. R. 605. See *Bapuji Sorabji v. The Clan Line Steamers* (1910) 34 Bom. 640, at p. 653 *et seq.*

S. 108. those goods further, unless before the end of the *transitus* (I shall say a word presently as to what comes at the end of the *transitus*) Kiell, the purchaser, became insolvent and stopped payment, and then if Falk stopped the goods *in transitu* he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the *transitus* came, his right to stop the goods *in transitu* might be defeated by an indorsement upon the bill of lading to a person who gave value. In the present case there was such an indorsement and transfer of the bill of lading, but it was only an indorsement and transfer for a particular and limited purpose. It appears that Mr. Kiell, in order to obtain an advance, got Messrs. T. Wiseman & Co., of Glasgow, the correspondents and agents of Messrs. Wiseman, Mitchell, Reid & Co., of Calcutta, to make an advance in his favour by drawing a bill of exchange upon him; and to secure the payment of that bill of exchange the bill of lading was indorsed, and the Bank of Scotland, who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of the stoppage *in transitu* at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop *in transitu* everything which was not covered by that pledge. That was settled and has been considered law, or rather equity, ever since the case of *In re Westzinthus* (s), and has been affirmed in *Spalding v. Ruding* (t) and I have no doubt it is very good law upon that point" (u).

"Other instrument of title to any goods".—It will be noted that the expression used in s. 102 is "document showing title" to goods, that used in the present section is "instrument of title" to goods, while those used in ss. 108 and 178 are respectively "document showing title" to goods and "document of title" to goods. In *Ramdas v. S. Amerchand & Co.* (v), the Judicial Committee, after referring to the

(s) (1833) 5 B. & Ad. 817; 39 R. R. 665. (v) (1916) L. R. 43 I.A. 164, 40 Bom. 630, affirming (1913) 38 Bom. 255;

(t) (1843) 6 Beav. 376; 63 R. R. 120. *Dolatram v. The B. B. & C. I. Railway*

(u) *Kemp v. Falk* (1882) 7 App. Ca. 581. *Co.* (1914) 38 Bom. 659; *Fakeerappa v. Thippanna* (1913) 38 Mad. 664.

expression "document of title to goods" as defined in the Indian Factors Act XX of 1844 (*w*), laid down that whenever any doubt arises as to whether a particular document is a "document showing title," or a "document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. The question in the case was whether a railway receipt (*x*) which entitled the endorsee to delivery was an "instrument of title" to goods within the meaning of s. 103. This, it was held, satisfied the test laid down above, and was a "document showing title" to goods within ss. 102 and 108, a "document of title" to goods within s. 178, and an "instrument of title" within s. 103 (*y*). After referring to ss. 102, 103, 108 and 178, their Lordships said:—

"Sections 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844, which, with certain modifications not material for the purposes of this appeal, made the provisions of the English Factors Act, 1842, applicable to British India. Both the last mentioned Acts use the expression "document of title to goods," and define it as including any bill of lading, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented. In their Lordships' opinion the only possible conclusion is that, whenever any doubt arises as to whether a particular document is a "document showing title" or "a document of title" to goods for the purposes of the Indian Contract Act, the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of the document to transfer or receive the goods thereby represented. In the present case it has been found as a fact by both the courts below, and is not, and indeed cannot be disputed before this board, that the railway receipts in question satisfy this test. It is therefore unnecessary to consider whether, apart from evidence as

(*w*) Repealed by the Indian Contract Act.

(*x*) See as to the incidents of a railway receipt in general, *M. & S. M. Railway Co., Ltd. v. Haridoss Banmalidas* (1918) 41 Mad. 371, at pp. 381-383.

(*y*) The decision in *G. I. P. Railway Co. v. Hanmandas* (1889) 14 Bom. 57, 66, 69, in so far as it lays down that a railway receipt cannot be an instrument of title within s. 103, is no longer law.

§. 103.

to the ordinary course of business, the effect of ss. 4 and 137 of the Transfer of Property Act (IV of 1882 as amended by II of 1900) would be conclusive on the point. It is clear that, even without the assistance of these sections, the receipts in question are documents showing title to goods within ss. 102 and 108 and documents of title to goods within s. 178 of the Indian Contract Act.

"Returning to s. 102, its effect may be stated as follows: First, so far as bills of lading are concerned, it enacts the rule of the Common Law by which a second buyer who obtained an assignment of the bill of lading obtained constructive delivery of the goods represented by the bill, so that the vendor's right of stoppage ceased. Secondly, so far as other documents of or showing title to the goods are concerned, it makes their assignment to a second buyer have the same effect as the assignment of a bill of lading. If, therefore, the respondents in these appeals had been second buyers and not pledgees of the goods represented by the receipts in question, the appellants' right of stoppage would have been displaced.

"Passing now to s. 103, it will be found to provide that where a bill of lading or other "instrument of title" to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the seller cannot, except on payment or tender to the pledgee of the advance so made, stop the goods in transit. If this section had used the expression "document showing title" or "document of title" instead of the expression "instrument of title," it is, in their Lordships' opinion, quite clear that it would have applied to the receipts in question, and that the vendors could not have stopped the goods in transit without payment or tender to respective respondents of the amounts of their advances, which were admittedly made in good faith and specifically upon the security of the receipts in question. In other words, the section would have done, in case of assignments by way of pledge, precisely what had been done in the previous section in the case of assignments upon a resale.

"Great stress was naturally laid by the appellants on this difference of expression. They argued that "instruments of title" were a particular species of the genus "documents of title," and they attempted to define the species as consisting of documents which conferred title in the same manner and sense as title is conferred by a bill of lading. In the first place it is to be observed that "title" in both expressions can relate only to the right to receive delivery of the goods to which the instrument or document relates. It can have nothing to do with ownership. A bill of lading may in this sense be an instrument or document conferring title; but, if so, the same is true of all the other documents contained in the genus "document of title." The fact that a document confers title in this sense cannot therefore be used as the distinguished mark of a particular species of the genus. The truth is that the only point in which a bill of lading differs from other "documents of title" is that its assignment, whether upon a resale or by way of pledge, operates as a constructive delivery of the goods to which it refers. The appellants' counsel was unable to mention, and their Lordships are not aware of, any other document with this peculiarity. In their Lordships' opinion the suggestion that the words "or other instrument of title" were inserted *per cautelam* in case there were

any such instrument other than a bill of lading is far-fetched. Moreover, they cannot help thinking that the section, if intended to have the effect for which the appellant contends, would have been otherwise worded. Further, do reason can be suggested why, if (as is clearly the case) the legislature intended by s. 102 to assimilate other documents of title to bills of lading for the purpose of determining the right of stoppage in transit in favour of a *bond-fide* purchaser for value, it should not have by s. 103 intended to do the same in favour of a *bond fide* pledgee for value. Under these circumstances little importance can be attached to the fact that one section employs the word "document" and the other the word "instrument," more especially as the use of the two expressions "document showing title" and "document of title" in the same sense shows that the draftsman was not very careful in his use of language."

Specific advance.—"The requirements of the section are complied with when it is shown that any sum is advanced on the terms that it is to be secured by the particular bill of lading in question or the goods represented by it, though it may be secured by other bills or goods also, and though the bill of lading may have been intended to be security not only for the particular sum or sums advanced upon it, but also for some antecedent liability" (2).

104.—The seller may effect stoppage in transit, either
 by taking actual possession of the goods, or
 by giving notice of his claim to the carrier
 or other depository in whose possession they are.

This enactment cannot be made plainer by illustration. It corresponds to long-settled English law. "At one time it seems to have been supposed," wrote Lord Blackburn, "that in order to make a good stoppage *in transitu* there must have been an actual taking possession of the goods by the vendor or his agent, but it is now clearly settled that the vendor's rights are complete on giving the person who has the possession of the goods notice of the vendor's claim to stop the goods at a time when he can obey it, although there is neither an actual taking of possession by the person stopping the goods, nor such an assent on the part of the holder as would amount to a constructive possession" (a).

(2) *Per Cur., Peacock v. Baijnath* on this point.
 (1891) 18 Cal. 573, 590, 591; L. R. 18 (a) Blackburn on Sale, 1st ed. (1845)
 Ind. Ap. 78. There was an appeal 267.
 to the Privy Council, but no judgment

8s. The language of the English Sale of Goods Act, s. 46, is almost
104, 106. identical.

105.—Such notice may be given, either to the person who has the immediate possession of the goods, or to the principal whose servant has possession. In the latter case, the notice must be given at such a time, and under such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant in time to prevent a delivery to the buyer.

The latter part of this section closely follows the words of the judgment of the Court of Exchequer in *Whitehead v. Anderson (b)*: “The only duty that can be imposed on the absent principal is to use reasonable diligence to prevent the delivery.” Where the transit is by sea, the description of “the principal whose servant has possession” appears to include the shipowner, who is the person most likely to know where the ship and its master are to be found. Lord Blackburn said in the House of Lords in 1882, commenting on a doubt expressed in the Court of Appeal: “I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu*. I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage *in transitu*” (c).

It is at least doubtful whether a notice of stoppage in transit addressed only to the consignee, and not to the shipowner or master, is effectual (d).

106.—Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid.

Right of seller on
stoppage.

Illustration.

A. sells to B. 100 bales of cotton; 60 bales having come into B.'s possession, and 40 being still in transit, B. becomes insolvent, and A., being still unpaid, stops the 40 bales in transit. A. is entitled to hold the 40 bales until the price of the 100 bales is paid.

(b) (1842) 9 M. & W. 518, 534; 60 p. 585.

R. R. 819, 832.

(d) *Phelps, Stokes & Co. v. Comber*

(c) *Kemp v. Fulk*, 7 App. Ca. at (1885) 20 Ch. Div. 813, 822, 826.

Resale.

S. 107.

107.—Where the buyer of goods fails to perform his

Resale on buyer's part of the contract, either by not taking failure to perform. the goods sold to him, or by not paying for them, the seller, having a lien on the goods, or having stopped them in transit, may, after giving notice to the buyer of his intention to do so, resell them, after the lapse of a reasonable time, and the buyer must bear any loss, but is not entitled to any profit which may occur on such resale.

Resale.—The effect of stoppage in transit is not to rescind the contract of sale, but to replace the seller in the position of an unpaid seller who has not parted with the possession of the goods (*e*). It remains to see what are his rights and remedies in that position. Lord Blackburn expressed the opinion long ago “that, viewing it as a practical question, the most convenient doctrine would be to consider the vendor as entitled in all cases to hold the goods as a security for the price, with a power of resale to be exercised, in case the delay of payment was unreasonably long, in such a manner as might be fair and reasonable under all the circumstances;” and that “the establishment of this principle would do very little violence to the decided cases.” It is certain that an unpaid seller is not justified in reselling the goods in the face of a tender of the price by the buyer, though the buyer may have been for some time in default (*f*); that, the buyer being in default, the unpaid seller is in some circumstances wholly justified in reselling, as when the goods are perishable (*g*); that even when he is not wholly justified the second buyer gets a practically good title by the resale (*h*); and that if the resale is at a loss the seller may still treat the contract as subsisting and recover damages from the

(*e*) Sale of Goods Act, 1893, s. 48, following (among other authoritative dicta) the opinion of Lord Blackburn in *Kemp v. Falk*, 7 App. Ca. at p. 581. There has never been any direct decision on this point.

(*f*) *Martindale v. Smith* (1841) 1 Q. B. 389; 55 R. R. 285.

(*g*) *Maclean v. Dunn* (1828) 4 Bing.

722; 29 R. R. 714.

(*h*) The first purchaser, while he is in default, is not entitled to the possession of the goods, and therefore cannot sue to recover the goods or their value. This is the result of many authorities, and the Sale of Goods Act, 1893, s. 47 (2), declares positively that the sub-purchaser acquires a good title.

S. 107. buyer, which may be a practicable course if the buyer, not being insolvent, has wrongfully refused to accept the goods (i). In strictness the seller was generally not entitled to resell even when the buyer was in default, though it is difficult to understand why the Courts felt bound so to decide; but as the buyer could in no case recover more than his actual damage (notwithstanding that the unauthorised resale is technically a conversion, and in an action of trover the measure of damages was generally the value of the goods), this was of very little importance before the Judicature Acts, and is now of none (j). The Sale of Goods Act, 1893, following a suggestion made in the Judicial Committee in 1866 (k), has expressly authorised resale where the buyer, after notice of the seller's intention to resell, fails to pay or tender the price within a reasonable time (l). S. 107 of the present Act is apparently founded on the same dictum, and in the result the English and the Indian rules may be said, since 1893 at all events, to be identical.

Right of resale does not bar other remedies.—The present section does not deprive an unpaid vendor of goods of any other remedy he may have. He is at liberty to rescind the contract under s. 55 if that section applies (m). “We are bound, I think, to determine questions of this kind, so far as we can, by reference to the Contract Act and not to English law; and ss. 51—58 appear to contain general provisions which are applicable to all cases of reciprocal promises” (n). “No doubt s. 107 declares one remedy, but it is only a partial remedy, for the purchaser might be insolvent, and the market depressed, in which case it would be small satisfaction for the vendor to resell” (o). Similarly, where property in goods sold had passed to the purchaser, and after paying for and taking delivery of a part he wrongfully declined to take delivery of the rest, and the undelivered portion was subsequently destroyed by fire, it was held in a suit by the vendor for the balance of the purchase-money that, though the plaintiff might have

(i) *Maclean v. Dunn* (1828) 4 Bing. (l) S. 47 (3).

722; 29 R. R. 714.

(m) *Buldeo Doss v. Howe* (1880) 6

(j) It would be quite useless for Cal. 64.

Indian purposes to refer to the authorities in detail.

(n) 6 Cal. per Garth, C.J., at p. 68.

(o) *Ib.* per Pontifex, J., at p. 69.

(k) *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127, 145.

See also *Buchanan v. Awdall* (1875) 15 B. L. R. 276, 292.

sold the undelivered portion under this section after the defendant had refused to perform his contract, he was not bound to do so, and the omission to take that course did not affect his right to recover the balance sued for.

S. 107.

Resale clause in indents.—The question whether a seller of goods has the right of resale is important, for where he has such a right he is entitled to claim as damages the difference between the contract price and the amount realized on the resale, while if he has no such right he is entitled to the difference between the contract price and the market price on the date of the breach. Now the power to resell may be either statutory, or it may be conferred on the seller by the terms of the contract of sale. In the former case it can be exercised only if the property in the goods has passed to the buyer, as is implied by the words of the present section (p); in the latter case it can be exercised even if the property in the goods has not passed to the buyer. Thus if it is provided in a contract of "indent" that on default on the part of the buyer to pay for and take delivery of the goods within a specified time the seller should be at liberty to resell the goods, and that the buyer should pay all loss arising on the contract with interest, the seller is entitled to resell the goods on default on the part of the buyer even if the property in the goods has not passed to the buyer, and to sue the buyer for the loss on resale (q). But it is necessary to the exercise of this power that the goods contracted for should at least have been appropriated for the purposes of the contract. If there has been no such appropriation, there is nothing to which the power of resale under the contract could attach, and the seller is not entitled in such a case to the loss on resale, but to the difference between the contract price and the market price at the date of the breach (r). It is, however, competent to the parties by an apt clause to provide for the exercise of the power of resale even if no goods are appropriated to the contract (s). According to English authority, the exercise of an expressly

(p) *Clive Jute Mills Co. v. Ebrahim Arab* (1896) 24 Cal. 177; *Yule & Co. v. Mahomed Hossain* (1896) 24 Cal. 124; *Basdeo v. John Smidt* (1899) 22 All. 55, 65; *Best v. Haji Muhammad* (1898) 23 Mad. 18, 30 Cal. 649.

(q) *Moll Schutte & Co. v. Luchmi Chand* (1898) 25 Cal. 505, dissenting on this point from *Yule & Co. v. Mahomed Hossain* (1896) 24 Cal. 124; *Angullia & Co. v. Sassoon & Co.* (1912) 39 Cal. 568.

(s) (1912) 39 Cal. 568, at p. 581.

88. reserved power of sale rescinds the contract (t), whereas resale apart
 77, 108. from any such convention, whether otherwise rightful or wrongful,
 does not.

Reasonable time.—The provision of s. 107 as to reasonable time must, of course, be observed. Thus it was held that a resale was not valid where it was hurried on in an unusual manner, and without proper advertisement (u). Again, if a seller elects to resell, he must do so within a reasonable time from the date on which the contract was finally repudiated by the buyer, as undue hardship might otherwise be caused to the buyer; for a seller may, with the deliberate intention of causing loss to the buyer, delay the resale until the market has fallen, and then resell the property and thereby cause to the buyer a loss which he might not have sustained had the resale taken place within a reasonable time from the date of the breach (v). What is a reasonable time is a question of fact.

Title.

108.—No seller can give to the buyer of goods a better
 Title conveyed title to those goods than he has himself, ex-
 by seller of goods title to those goods than he has himself, ex-
 to buyer. cept in the following cases:—

Exception 1.—When any person is, by the consent of the owner, in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate or warrant or order for delivery, or other document showing title to goods, he may transfer the ownership of the goods of which he is so in possession, or to which such documents relate, to any other person, and give such person a good title thereto, notwithstanding any instructions of the owner to the contrary (w): Provided that the buyer

(t) *Lamond v. Davall* (1847) 9 Q. B. 1030, 72 R. R. 502. tion does not apply "where there is only a qualified possession, such as a

(u) *Buchanan v. Ardall* (1875) 15 B. L. R. 276. hirer of goods has, or where the possession is for a specific purpose"; *Green-*

(v) *Prag Narain v. Mul Chand* (1897) 19 All. 535. *wood v. Holquette* (1873) 12 B. L. R. 42 (note to Act).

(w) It has been held that this excep-

acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods or documents has no right to sell the goods (x)

Exception 2.—If one of several joint owners of goods has the sole possession of them by the permission of the co-owners, the ownership of the goods is transferred to any person who buys them of such joint owner in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession of the goods has no right to sell them.

Exception 3.—When a person has obtained possession of goods under a contract voidable at the option of the other party thereto, the ownership of the goods is transferred to a third person who, before the contract is rescinded, buys them in good faith of the person in possession; unless the circumstances which render the contract voidable amounted to an offence committed by the person in possession or those whom he represents.

In this case the original seller is entitled to compensation from the original purchaser for any loss which the seller may have sustained by being prevented from rescinding the contract.

Illustrations.

(a) A. buys from B., in good faith, a cow which B. has stolen from C. The property in the cow is not transferred to A.

(b) A., a merchant, entrusts B., his agent, with a bill of lading relating to certain goods, and instructs B. not to sell the goods for less than a certain price, and not to give credit to D. B. sells the goods to D. for less than that price, and gives B. three months' credit. The property in the goods passes to D.

(z) We do not find either in this of a mercantile agent," on which exception or elsewhere in the Act any see *Oppenheimer v. Attenborough & Son* words equivalent to those of the Eng- [1907] 1 K. B. 510; *Oppenheimer v. lib Factors Act, 1889, s. 2, sub-s. 1, Frazer & Wyatt, ib. 519, and p. 539,* as to "the ordinary course of business below.

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(c) A. sells to B. goods of which he has the bill of lading, but the bill of lading is made out for delivery of the goods to C., and it has not been indorsed by C. The property is not transferred to B.

(d) A., B., and C. are joint Hindu brothers, who own certain cattle in common. A. is left by B. and C. in possession of a cow, which he sells to D. D. purchases *bonâ fide*. The property in the cow is transferred to D.

(e) A., by a misrepresentation not amounting to cheating, induces B. to sell and deliver to him a horse. A. sells the horse to C. before B. has rescinded the contract. The property in the horse is transferred to C.; and B. is entitled to compensation from A. for any loss which B. has sustained by being prevented from rescinding the contract.

(f) A. compels B. by wrongful intimidation, or inducing him by cheating or forgery, to sell him a horse, and, before B. rescinds the contract, sells the horse to C. The property is not transferred to C.

History of the Section.—The clauses corresponding to this section in the Contract Bill (y) drafted by the Law Commissioners provided in effect that a purchaser acting in good faith, and in the absence of suspicious circumstances, might acquire a good title from any person in possession of goods, in other words, that every place in India should be a market overt. The Select Committee to which the Bill was referred objected to this clause, the ground of objection being substantially that the provision would make British India an asylum for cattle stealers from the native States. The clause, after a good deal of controversy, was ultimately moulded in its present form (z). It may be observed that in England the law of market overt has long ceased to be of any general importance (a). The Commissioners' proposal, whatever its merits may have been, was to enact a law on this point not at all resembling the modern common law.

The capacity to give a good title in such circumstances given by ss. 2, 8, and 9 of the Factors Act, 1889, and s. 25 of the Sale of Goods Act, 1893, is confined to the following classes of persons:—

(a) Those who, having sold goods, continue or are in possession of the goods, or of the documents of title to the goods ;

(y) This was clause 75 in the Bill, 81 in the draft as first printed.

(z) Ilbert on Legislative Forms and Methods, pp. 133, 134; and see Sir H. Maine's minute of 11th September 1868, in "Minutes by Sir H. S. Maine, 1862-9" (Calcutta, 1890), p. 140.

(a) See *Hargreave v. Spink* [1892] 1 Q. B. 25, and the judgment of Scrutton, J., in *Clayton v. Le Roy* [1911] 2 K.B. at pp. 1038 *seq.*, where further references may be found. It would be useless for Indian purposes to enter on any details here.

- (b) Those who, having bought or agreed to buy goods, obtain with the consent of the seller possession of the goods, or the documents of title to the goods ;
- (c) Mercantile agents acting in the ordinary course of business of a mercantile agent.

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Persons included in the classes (a) and (b) may give a good title whether they act by themselves or by a mercantile agent. The definition of a mercantile agent is " a mercantile agent having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods " (Factors Act, 1889, s. 1). The use of the term " mercantile agent " has been explained as intended to express in a compendious form the result of the decisions as to who were agents within the meaning of the older Factors Acts (*b*). There is nothing in the Indian Contract Act equivalent to the limitation as to the " ordinary course of business " imposed on class (*c*).

Indian Factors Acts.—This section is in part substituted for, and *in pari materia* with, the Factors Acts XIII of 1840 and XX of 1844, which are repealed by the present Act, and which extended to British India the provisions of the several English Factors Acts, 4 Geo. IV. c. 83 as amended by 6 Geo. IV. c. 94 and 5 & 6 Vict. c. 39 (*c*). But while the present section provides for the case of *sale*, those Acts dealt with the *pledge* of goods for which provision is now made in s. 178 (p. 652, below). In a recent case the Judicial Committee said : " Secs. 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844 " (*d*).

While the first exception follows in a general way the lines of the English Factors Acts, its language does not very closely resemble that of any English enactment. It is far wider than that of the old Factors Acts which were repealed and consolidated in 1899 (*e*), and it remains wider than the last-mentioned Act and the partial repetition thereof

(b) Per Channell, J., in *Oppenheimer v. Attenborough* [1907] 1 K. B. at p. 514. (1916) L. R. 43 L.A. 164, 168-169, 40

(c) See *G. I. P. Ry. Co. v. Hanman*. Bom. 630, 634.

das. (1889) 14 Bom. 57, 68.

(d) 52 & 53 Vict. o. 45.

§. 108. in the Sale of Goods Act, s. 25. English authorities, therefore, which turn on the law previous to the Factors Acts, or on the construction of either the repealed Acts or the enactments now in force, can be of very little use in British India. But it may be worth while to state shortly, following a very careful and learned judgment of Willes, J. (*f*), the limits of the exceptions recognised by the Common Law, apart from statutory amendments, to the rule that a man cannot give a better title to goods than he has himself. Current coin and negotiable instruments, not being ordinary merchandise, are no real exception. We have then the cases, first, of sale in market overt; secondly, of sale by a person holding under a contract voidable for fraud or the like at the other party's option—here, the transaction being valid until rescinded, a third person purchasing in good faith and for value gets an indefeasible title; thirdly, “where an agent who carries on a public business deals with the goods in the ordinary course of it, though he has received secret instructions from the principal to deal with them contrary to the ordinary course of that trade”—here the principal is estopped from repudiating the agent's ostensible authority. But the protection given by this last rule to buyers or lenders in good faith was inadequate, for the possession of goods does not of itself amount to an ostensible authority to deal with the property (*g*); and a person whose employment consists in dealing with other men's goods in one way does not, by possessing goods in the course of that employment, acquire ostensible authority to deal with them in any other way (*h*).

Under the present section a seller can give to the buyer of goods a better title than he has himself, provided—

(1) that the possession of the *seller* is such as fulfils the requirements of the section, and

(2) that the *purchaser* has acted in the manner prescribed by the section.

(*f*) See *Fuentes v. Montis* (1868) judgment also gives the history of the L. R. 3 C. P. at pp. 276, 277; and *cp.* earlier Factors Acts.

Cole v. North-Western Bank (1875) (*g*) *Johnson v. Credit Lyonnais* (1877) L. R. 10 C. P. at pp. 362, 363, judgment of Blackburn, J., in Ex. Ch. This L. R. 3 C. P. Div. at pp. 39, 40.

(*h*) See L. R. 10 C. P. at p. 369.

Character of vendor's possession.—The conditions qualifying the seller's possession may be dealt with first. These are laid down in the first and third exceptions to the section. Under the first exception, a person in possession of goods or the indicia of title to goods therein specified may give a "good" title to the buyer, if (1) the seller is in possession "by the consent of the owner," and (2) the possession is acquired under such circumstances that "the owner of the goods, although he has parted with the possession, may give instructions to the person in possession" (i). It is conceived that by the word "consent" in this exception we are generally to understand "free consent" as defined in s. 14 of the Act. For cases in which possession is obtained otherwise than by free consent provision is made in the third exception. There may, however, be cases falling within the terms of both exceptions. In England it is held that in the Sale of Goods Act, s. 25, sub-s. 2, which deals with the case of a buyer obtaining with the consent of the seller possession of the goods or of the documents of title thereto, possession means actual custody, and "if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by the consent of the owner, even though it were under a contract voidable as fraudulent, . . . he is able to pass a good title to a *bona fide* purchaser" (j). But if the consent is due to deceit of such a kind that the obtaining of possession amounts to larceny by a trick the *bona fide* purchaser does not acquire a good title. Such consent is not consent in the eye of the law (k). The possession contemplated by the first exception does not extend to every case of detention of chattels with the owner's consent. "The exception has particular relation to the cases of persons allowed by owners to have the indicia of property or possession under such circumstances as may naturally induce others to regard them as owners, and constituting some degree of negligence or defect or precaution imputable to the true owners" (l). Stating it in other words, the possession must be one "which is unqualified, and not

(i) *Greenwood v. Holquette* (1873) C. P. at p. 373; per Lord Collins in *12 B. L. R. 42, 46.* *Cahn v. Pockett's Bristol, etc., Co.* [1899]

(j) *Cahn v. Pockett's Bristol, etc.,* 1 Q. B. at p. 659; *Oppenheimer v. Frazer Co.* [1899] 1 Q. B. 643, 658, C. A., and *Wyatt* [1907] 2 K. B. 50. see p. 513, above.

(l) *Shankar v. Mohanlal* (1887) 11

(k) Per Lord Blackburn in *Cole v. North-Western Bank* (1875) L. R. 10 Bom. 704, 706, 707.

- §. 108. to be restricted otherwise than by the owner giving instructions to the person who has it."(*m*). This is implied in the expression "notwithstanding any instructions of the owner to the contrary." Thus the possession of the factor or an agent is within his exception, for in such a case, although the owner has parted with possession, he may give instructions to the person in possession what to do with the goods, *e.g.*, not to sell before a particular time, or for less than a particular price. But the possession of a hirer of goods or possession for a specific purpose does not come within this exception, for in such a case the owner has no right to give instructions, the nature of the possession and the powers of the person having it being determined by the contract of hiring, or the contract under which possession is taken. Thus where a piano had been hired from the plaintiff with an option of purchase, and the hirer sold the piano to the defendant before he had exercised that option, it was held that the defendant was liable in trover to the plaintiff, although it was found that he acted in perfect good faith (*n*). Similarly where the plaintiff left a buffalo and a calf with a third person to be taken care of by him during his absence from home, and the latter sold the animals to the defendant, it was held that the plaintiff could recover them from the defendant (*o*). And, for like reasons, the provisions of the exception do not apply "where the possession is entirely beyond the control of the owner of the goods" (*p*). It may here be noted that, though the expression

(*m*) *Greenwood v. Holquette* (1873) 12 B. L. R. 42, 46. *v. McGregor* (1902) Punj. Rec. no. 27.

(*n*) *Ibid.*, at pp. 46, 47.

(*o*) *Shankar v. Mohanlal* (1887) 11 Bom. 704. It follows from what has been stated above that if a buyer of horses leaves them with the seller for facilities of exercise and training, the buyer agreeing to pay for the keep of the horses, and the seller afterwards delivers them to a creditor of his in satisfaction of a debt, who receives the same without notice of the sale, the property in the horses does not pass to the creditor, and the buyer can recover them or their value from the creditor. The contrary, however, was held by the Chief Court of the Punjab in *Framji*

The ground of the decision is that, the buyer having allowed the seller to retain possession of the goods, he led the creditor to believe that the seller was the owner; which is really too absurd for discussion. If the Chief Court were right, the exception would cover every halloo—indeed why not every servant?—and every such person would be able to give a buyer from him an indefeasible title to the goods in his custody. It is most unfortunate that such decisions, if they must sometimes occur, should be reported.

(*p*) *Le Geyt v. Harvey* (1884) 8 Bom. 501, 509.

“ notwithstanding any instructions of the owner to the contrary ” is omitted in s. 178, which deals with the case of *pledge* by an ostensible owner, the word “ possession ” occurring in that section means juridical possession as distinguished from mere custody (q). S. 108.

Where A. has acquired the possession of goods not with such consent on the part of the real owner as would enable A. to give a good title, and A. then forms a partnership with innocent persons B. and C. for the purpose of dealing in the goods, B. and C. supposing A. to have *bonâ fide* possession, and B. and C. in the course of the partnership business sell the goods to an innocent purchaser D. the vice in A.'s possession vitiates the possession of B. and C. who acquire no title and are guilty of conversion in selling to D. (r).

An attempted transfer of ownership by a person who is not in possession to a person who is already in possession will obviously not be helped by the present exception (s).

Seller with voidable title.—Under the third exception (t) a seller may give a better title to the buyer than he himself has, though he may not be in possession of the goods by the free consent of the owner, and the possession may not have been acquired under such circumstances that the owner of the goods may give instructions to the person in possession. It is clear that if possession is obtained under a contract that is voidable (ss. 19, 19A) on the ground of coercion (s. 15), undue influence (s. 16), fraud (s. 17), or misrepresentation (s. 18), there can be no free consent (s. 14). And it is equally clear that if such a contract is one of sale, as in Illustration (c), there can be no room for any instructions by the owner to the person in possession. But though a seller in possession of goods under a voidable contract may transfer the ownership thereof, he cannot do so after the contract is rescinded by the owner. And even before rescission the ownership cannot be transferred, if the circumstances which render the contract

(q) *Seager v. Hukma Kessa* (1900) 24 Bom. 458 ; *Biddomoye Dabee v. Sittaram* (1878) 4 Cal. 497. v. *King-Emperor* (1908) Punj. Roo. Cr. no. 2. Cp. *Nicholson v. Harper* [1895] 2 Ch. 415.

(r) *Oppenheimer v. Frazer & Wyatt* [1907] 2 K. B. 50. (t) We postpone comment on the second exception, which is in different matter.

(s) It makes no difference that the sale is in market overt: *Faiz Ahmad*

S. 108. voidable amount to an offence, *e.g.*, wrongful intimidation, cheating^(u) or forgery, as in Illustration (f). In Illustration (a) B. has obtained possession of the cow by the offence of theft. Here the possession is not acquired under a contract, and the case, therefore, does not come within the third exception; nor is it covered by the first exception, because the possession is not obtained "by the consent of the owner." The general rule of law laid down in the first paragraph of the section will, therefore, apply, and as B. has no title to the cow, he can transfer none to A. In such a case the cow may be transferred to its owner under s. 517 of the Criminal Procedure Code (V. of 1898); and if B. is convicted of theft, the Court dealing with the offence may, under s. 519, direct payment to A. of the price paid by him out of moneys, if any, taken out of B.'s possession on his arrest. As to the rights of a transferee of a negotiable instrument obtained by means of an offence or fraud, see Negotiable Instruments Act XXVI of 1881, s. 58. See also Indian Trusts Act II of 1882, s. 64.

The use of the word "offence" in this section has not caused, nor is it likely to cause, any difficulty. The word is defined in the General Clauses Act X of 1897 as "any act or omission made punishable by any law for the time being in force" (s. 3). This definition, however, does not apply to any enactments prior to that act (ss. 3, 4). There is no definition of the word "offence" in the General Clauses Act I of 1868. The only enactment prior to the Contract Act in which that word is defined is the Indian Penal Code (XLV), s. 40, where it is confined to an act or omission punishable by the Code. Though

(u) A. induces B., by cheating, to sell and deliver jewels to him. A. sells the jewels to C. Here the contract between A. and B. is voidable, and the circumstances which render the contract voidable amounted to an offence. The property in the jewels, therefore, is not transferred to C., and B. is entitled to recover them from C. But if B., with knowledge of the fact that he was cheated by A., sues A. and obtains a decree against him, he cannot, while the decree is subsisting, rescind the contract and sue C. for recovery of the jewels from him. "After [B.] had

thus obtained the decree which is subsisting, [he] could no longer elect to avoid the contract. That being so, at the date of the suit [B.] had not only no title to the property, but [he] was not in a position to avoid the contract so as to divest the property from [C.] with the result of revesting it in [him]:" *Tholasirum v. Duraji* (1905) 15 Mad. L. J. 375 B., having affirmed the contract by suing on it, is estopped from denying that the property passed. It seems, however, by reason of the words of the Act, that C.'s title is by estoppel only.

there is nothing in the present section to indicate that the word is used in that limited sense, it is difficult to conceive what offence other than some one defined in the Penal Code can be constituted by circumstances which render a contract voidable at the option of the other party thereto. S. 108.

It will be observed that the terms of this exception are wider than those of s. 23 of the English Sale of Goods Act, which seems to be limited to cases where property and not merely possession has been acquired under a voidable contract.

Good Faith, etc.—It is necessary both under the first and third exceptions that the buyer should act in good faith. The term “good faith” is defined in the Indian Penal Code, s. 52: “Nothing is said to be done or believed in good faith which is done or believed without care and attention.” Though the definition of an expression in a penal statute should not be literally applied to an enactment exclusively civil, it is submitted that the above definition in fact embodies the sense in which “good faith” is generally understood in civil law, and therefore may be taken as a practical guide in construing the present section. It is conceived that a buyer would be deemed to have acted in good faith within the meaning of this section if he acted with the “care and attention” expected of a man of ordinary prudence. Regarded from this point of view, the other condition that the purchase must have been made by the buyer under circumstances which do not raise a reasonable presumption that the seller has no right to sell may be regarded as merely explanatory of “good faith”; for it is clear that a buyer cannot be said to act in good faith if he purchases from an ostensible owner under circumstances raising a reasonable presumption that he has no right to sell. The presumption, again, must be a “reasonable” one, and the mere proof of a fact giving rise to a vague suspicion that the seller had no authority to sell would not be sufficient to shift on the buyer the burden of proving good faith (v).

Goods.—Share certificates are goods within the meaning of this section (w).

(v) Generally the burden of proving the contrary is on the seller, etc., who has not elected to avoid the original sale before the resale, etc., took place.

See *Whitehorn Bros. v. Davison* [1911], 1 K. B. 463, C.A.

(w) *Hazarimul v. Satis Chandra Ghosh* (1918) 22 Cal. W. N. 1036, 1039, 1042.

8s.
98, 109.

Documents showing title to goods.—All the documents enumerated in this section, excepting warehouse-keeper's certificate and wharfinger's certificate, were specified in s. 4 of the English Factors Act of 1842 (5 & 6 Vict. c. 39) which was extended to British India by Act XX of 1884. A mate's receipt for goods shipped on board a vessel is not a document of title (x). As to railway receipts, see notes to s. 103 under the head "Other instruments of title to any goods," p. 524 above.

Second Exception: "joint owners" Presumption in case of joint Hindu family.—Where one member of a joint Hindu family is found to be in possession of any property, the family being presumed to be joint in estate, the presumption is that he was in possession of it not as separate property acquired by him, but as a member of a joint family (y). See Illustration (d).

Delivery order.—See notes to s. 95, pp. 503, 504, above.

Warranty.

109.—If the buyer, or any person claiming under him, is, by reason of the invalidity of the seller's title, deprived of the thing sold, the seller is responsible to the buyer, or the person claiming under him, for loss caused thereby, unless a contrary intention appears by the contract.

Seller's responsibility for badness of title.

Warranty and Condition.—In England the word "warranty" has been used with several different meanings and shades of meaning, and often obscurely; and the difficulty has been increased by some of those meanings overlapping some of the meanings of the word "condition." Full discussion may be found in the works of Sir William Anson (z) and Sir Mackenzie Chalmers (a). This Act avoids the use of "condition" in the present connection, but does not define "warranty." It uses the word warranty both in the sense of the "condition" and the "warranty" of the English Sale of Goods Act.

(x) *Juggernath Augurwallah v. Smith Chunder* (1873) 11 B. L. R. 193.
 (1906) 33 Cal. 547, at p. 559; see also (z) *Contract*, 14th ed. 180-184, 360 *eqq.*
Natcheappa v. Irrawaddy Flotilla & Co. (a) *On the Sale of Goods Act*, 1893,
 (1914) 41 Cal. 670. 7th ed.
 (y) *Taruck Chunder v. Jodeshur*

In s. 117 "warranty" is used in the strict sense in which it is used in English law; in s. 118 it is used in the wider sense of the English "condition." The following summary remarks may be found useful as a guide to the intention of the Act and to the understanding of English authorities in which these terms occur.

In the first place, it is to be borne in mind that a contracting party is bound to perform his contract according to its terms, to deliver the specific goods if he sold ascertained goods, or to supply goods answering the description in the contract if he contracted to sell goods not ascertained. Offer of a thing different from what was contracted for is not a breach of one term, but a total failure to perform the contract.

"If a man offers to buy peas of another, and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas; the contract is to sell peas, and if he sends him anything else in their stead it is a non-performance of it" (b).

The existence of special conventional provisions as to this or that part of the contract does not derogate from the duty of performance as a whole.

Now the parties, if such is their will, may put the contents of any particular statement or promise which passes between them on the same footing as the description of the thing contracted for, so that, if it is not made good by the party undertaking it, the failure is deemed to be a total failure of performance, and the other is wholly discharged. This is a *condition* in the proper sense.

There may also be, and there occur in common practice, auxiliary promises or undertakings of which the breach is not intended to avoid the contract, but only to give a remedy in damages. These are *warranties* in the proper sense. An affirmation may amount to a warranty if so intended (c).

(b) Lord Abinger, C.B., in *Chanter v. Hopkins* (1838) 4 M. & W. at p. 404; 51 R. K. at pp. 654, 655, approved in *Ex. Ch. Azemar v. Casella* (1867) L. R. 2 C. P. at p. 679; *Drummond v. Van Ingen* (1887) 12 App. Ca. 284; and see Pollock on Contract, 527, 530. (c) Assertion by the vendor of a fact unknown to the purchaser is not necessarily a warranty as matter of law: *Heilbut, Symons & Co. v. Buckleton* [1913] A. C. 30.

S. 109. But a condition may include a warranty; that is to say, a seller's undertaking may be such that the buyer may waive it as a condition by accepting performance, but may still have a remedy in damages for the failure in that particular undertaking. And "a stipulation may be a condition though called a warranty in the contract" (*d*). The question is, What was the real intention, taking the contract as a whole? To many contracts conditions, breach of which may be treated by the buyer as avoiding the contract, or, if he exercises his right of waiver as giving a right to damages, are annexed by the law although the parties have used no express words that would create such a stipulation. These are called implied conditions, and are enforced on the ground that the law infers from all the circumstances of the case that the parties intended to add such a stipulation to their contract, but did not put it into express words. The existence of an implied condition or warranty may be rebutted by proof of facts which show a contrary intention. Confusion has been created in this branch of law by use of the term *implied warranty* to denote what is really an *implied condition*. Sometimes a warranty, in the strict sense of the term, is implied by law where no inference would arise of an implied condition. (See s. 117, p. 555 *post*, and note.)

Whether the property in goods sold passes to the purchaser or not, he is entitled to reject the goods if they are not in accordance with the description in the contract, provided that the description forms an actual part of the conditions of the contract, and not something collateral to it. "Under the law in this country, a man is not bound unless he has altered his position by some conduct of his own, to accept and to pay for goods which are not in accordance with the description of the goods he bargained for. If any statutory authority is necessary for that, we think the general principle laid down in s. 51 of the Contract Act applies to the case" (*p*).

If the terms of the contract exclude any warranty as to the description of the goods, this does not deprive the buyer of his

(*d*) Sale of Goods Act, 1893, s. 11; *Doss* (1887) 15 Cal. 1, 4, 5. S. 51 of *Barnard v. Faber* [1893] 1 Q. B. 340, the Act does not appear to us, with C.A. great submission, to be much to the

(*e*) *Mitchell, Reid & Co. v. Buldeo* purpose.

right to have goods according to contract, or disable him from suing for damages, as if on a warranty if he discovers that they do not answer the description contracted for after he has accepted and dealt with them (*f*).

Seller responsible for title.—It was formerly said that by the Common Law the seller of goods was not bound, unless by express agreement, to answer for his title to the goods sold. But the exceptions allowed to the supposed rule were, in the modern authorities, of more importance than the rule. It was admitted that there was an "implied warranty of title" if the seller affirmed the goods to be his own, and he was deemed to make that affirmation when goods were sold at a shop or warehouse where the seller usually dealt with such goods. Further, it was allowed that on a sale of unascertained goods the seller answered for his title (*g*). On the whole it seems to be the modern common law, and it certainly is so held in America, that the occasions when the seller does not warrant his title are really exceptional. One class of such occasions is where the seller is executing an authority given by law which overrides the general owner's title, as on the sale of a forfeited pledge by a pawnbroker (*h*), or goods taken in execution by a sheriff (*i*), or where he derives his title through a sale under such authority. There may also be an understanding in fact between the parties that the seller is dealing only with such interest as he may have; in that case any implied warranty is, on general principles, excluded (*j*).

However this may be, the present section has given effect to the modern view in British India, and twenty-one years later s. 12 of the Sale of Goods Act did the same for England in a more elaborate form.

(*f*) *Wallis, Son & Wells v. Pratt & Haynes* [1911] A. C. 394.

(*g*) See *Eichholz v. Bannister* (1864) 17 C. B. N. S. 708, and citation thereof in *Framji v. Hormasji* (1877) 2 Bom. 258, 263.

(*h*) *Morley v. Attenborough* (1849) 3 Ex. 500; 77 R. R. 709.

(*i*) *Ex parte Villars* (1874) L. R. 9 Ch. 432, 437. But an express asser-

tion that the goods are the property of the execution debtor will amount to a warranty to the buyer, to the extent at all events of the purchase-money in the hands of the sheriff or execution creditor: *Framji v. Hormasji* (1877) 2 Bom. 258.

(*j*) *Bagueley v. Hawley* (1867) L. R. 2 C. P. 625, where the Court was divided in opinion upon the facts.

ss. 109, 110. In exceptional cases like that of the sale of Goods taken in execution the English authorities are followed here (*k*).

110.—An implied warranty of goodness or quality may be established by the custom of any particular trade.

Establishment of implied warranty of goodness or quality.

Warranty implied by usage of trade.—This section is founded on *Jones v. Bowden* (*l*), where it was held that a trade usage to declare any sea-damage on the sale of drugs by auction had the effect of creating a warranty that drugs so sold without any declaration were free from sea-damage. *Cp.* Sale of Goods Act, 1893, s. 14, sub-s. 3.

Trade usage might, on the other hand, have the effect of dispensing with what would otherwise be part of the obligation of a contract, or reducing a condition to a warranty. But any such usage must, of course, be proved if it is relied upon. "If the custom went the length of saying that there should be no remedy for any variation in the quality contracted for, it would of course be unreasonable, for it would absolutely alter the nature of the contract." (*m*).

An importing firm which accepts a commission to order out goods from Europe at a specified rate, and undertakes that the goods will be invoiced to the indenter at that rate, does not, in the absence of proof of usage to the contrary, fulfil its contract by offering to the indenter goods procured in Bombay from another firm in Bombay, though they answer the description of the goods in the order (*n*). The actual decision has in itself nothing to do with warranty, but only illustrates the general rule that all express terms of a contract are presumed to be material. It is not clear from the report why the Court thought any question of importance was involved; but the arguments, as is too common in Indian reports, are wholly omitted.

Merchandise Marks Act IV of 1889.—Besides the implied warranties enumerated in this and the following sections, there is another such

(*k*) *Dorab Ally v. Executors of Khajah Mohecodeen* (1878) 3 Cal. 806, 813; L. R. 5 Ind. Ap. 116. A sheriff selling property taken in execution does undertake that he is acting within his jurisdiction: *ib.*

(*l*) (1814) 4 Taunt. 847; 14 R. R. 683.

(*m*) *Re Walkers, Winsor, and Hamm and Shaw & Co.* (1904) 2 K. B. at p. 158.

(*n*) *Bombay United Merchants' Co. v. Doolubram* (1887) 12 Bom. 50.

warranty established by s. 17 of the above Act, in respect of trade mark and trade description.

8a.
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Warranty of
soundness implied
on sale of pro-
visions.

111.—On the sale of provisions, there is an implied warranty that they are sound.

Warranty on sale of provisions.—This is in accordance with the law as stated by Blackstone : “ In contracts for provisions, it is always implied that they are wholesome ; and if they be not, the same remedy [an action for damages, then regarded as an action in tort for deceit] may be had ” (o). But later authorities did not allow this to be applicable to a sale of specific goods where the buyer had an opportunity of inspection ; for “ the undoubted general law is, that, in the absence of all fraud, if a specific article is sold, the buyer having an opportunity to examine it and selecting it, the rule of *caveat emptor* applies (p).” The law was thus declared by the Court of Exchequer, and a few years later the Court of Queen’s Bench apparently thought the deduction correct : “ So in the case of a sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied ” (q). But now, many, if not all, such cases are within the rules laid down in s. 14 of the Sale of Goods Act. The plaintiff entered a public-house licensed for the sale of beer to be consumed on the premises, knowing that all the beer sold at that house was supplied from H.’s brewery and with the object of getting H.’s beer because he preferred it. He was afterwards seized with illness, and the jury found that the illness was to a large extent due to arsenical poisoning caused by arsenic present in the beer, and that he had contributed to the poisoning by excessive drinking ; they further found that the plaintiff did not rely for the good quality of his beer on the skill or judgment of the defendant, the keeper of the public-house, and that the plaintiff had sustained damage to the amount of £50. The Court of Appeal held that a verdict had been rightly entered for the plaintiff, on the

(o) Comm. iii. 166.

(q) *Jones v. Just* (1868) L. R. 3

(p) *Emmerton v. Matthews* (1862) 7 Q. B. 197, 202.

H. & N. 586.

8s.
111, 112. ground that he had bought goods from a seller who dealt in goods of that description, and that there was an implied condition that they should be of merchantable quality (r). If the jury do not find that the buyer did not rely on the seller's skill and judgment, sub-section (1) of s. 14 can be applied in many cases (s).

For British India the law is brought back to Blackstone's opinion by the present section. It is conceived that "sound" means "wholesome," and does not import a warranty of perfect condition and flavour, in wine or spices for example.

112.—On the sale of goods by sample, there is an implied warranty of bulk implied on sale of goods by sample. quality to the sample.

Warranty on sale of goods by sample.—At common law the legal effect of a sale by sample is "as if the seller had in express terms warranted that the goods sold should answer the description of a small parcel exhibited at the time of the sale," and that, as a general rule, "the purchaser may reject the commodity if it does not correspond with the sample" (t), but (as in other like cases) not after he has accepted the goods or dealt with them as his own (u). The buyer is entitled to reasonable facilities for inspecting the bulk independently of any local or trade usage to that effect (v); and if there is any latent defect in the sample (that is, a defect not discoverable by the ordinary examination of a prudent buyer) which, if present in the bulk, would render the goods unmerchantable, the sample is to be taken as if free from it (w). All these rules are now embodied in the English Sale of Goods Act, s. 15. The last of them is really a special application of the principle that the seller's duty to furnish merchantable goods answering the description in the contract is paramount to any particular warranty. It will not avail him that the sample was faulty. "When a purchaser states generally the kind of article he requires,

(r) *Wren v. Holt* [1903] 1 K. B. 611. Abbott, C.J.

See s. 14 (2) of the Sale of Goods Act.

(u) *Parker v. Palmer*, last note.

(s) *Frost v. Aylesbury Dairy Co.*

(v) *Lorymer v. Smith* (1822) 1 B. & [1905] 1 K. B. 608, C. A.; and see s. 114, C. 1.

post.

(w) *Heilbutt v. Hickson* (1872) L.R.

(t) *Parker v. Palmer* (1821) 4 B. & 7 C. P. 438. See Benjamin on Sale, Ald. 387, 391; 23 R. R. 313, 315, per 4th ed. 646 (shorter in 5th ed. 647).

and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty" (x). "Neither inspection of bulk nor use of sample absolutely excludes an inquiry whether the thing supplied was otherwise in accordance with the contract" (y). This is so even where goods have been expressly warranted only equal to sample; for such a term limits the buyer's right to complain of the quality, but does not deprive him of the right to have the kind of goods he bargained for (see s. 113, below).

8a,
112, 113

A sale at which a specimen of the goods is exhibited may nevertheless not be a sale by sample; for it is consistent with the buyer relying on the description alone and not stipulating for conformity to the specimen produced (z). This distinction is not likely to be of frequent importance in modern practice.

A mistake in the sample exhibited may prevent the formation of any contract at all, as where the sample is inadvertently taken from a bulk different from the specific bulk intended and expressed to be sold. It is hardly needful to say that such cases are rare (a).

113.—Where goods are sold as being of a certain denomination, there is an implied warranty that they are such goods as are commercially known by that denomination, although the buyer may have bought them by sample, or after inspection of the bulk.

Warranty implied where goods are sold as being of a certain denomination.

Explanation.—But if the contract specially states that the goods, though sold as of a certain denomination, are not

(x) Per Lord Herschell in *Drummond* Willen, J.
 v. *Van Ingen* (1887) 12 App. Ca. 284, (z) *Gardiner v. Gray* (1815) 4 Camp.
 294. 144; 16 R. R. 764.
 (y) *Mody v. Gregson* (1868) L. R. (a) *Megaw v. Molloy* (1878) 2 L. R.
 4 Ex. 49, 56, judgment of Ex. Ch. per Ir. 530.

8. 113. warranted to be of that denomination, there is no implied warranty.

Illustrations.

(a) A., at Calcutta, sells to B. twelve bags of "waste silk" then on its way from Murshedabad to Calcutta. There is an implied warranty by A. that the silk shall be such as is known in the market under the denomination of "waste silk." [*Gardiner v. Gray*, 4 Camp. 144; 16 R.R. 764.]

(b) A. buys by sample, and after having inspected the bulk, 100 bales of "Fair Bengal" cotton. The cotton proves not to be such as is known in the market as "Fair Bengal." There is a breach of warranty.

Warranty as to denomination of goods.—According to the English authorities, "the purchaser has a right to expect a saleable article answering the description in the contract" (Lord Ellenborough in *Gardiner v. Gray*, cited above) if he has not an opportunity of inspection, and to expect an article at all events answering the description, even if he has been able to inspect it. The language of the present section appears to be derived from a summing-up of Earle, C.J., which was approved by the Court of Common Pleas (*b*). The same case appears to have suggested Illustration (*b*), where the use of the word *warranty* is rather unfortunate. The so-called breach of warranty is a failure to perform the contract, which was to supply "Fair Bengal" cotton (see Lord Abinger's classical observation cited at p. 544 above).

"In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description, and if they do not, it is necessary to put any other question to the jury." Further, "in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be saleable or merchantable under that description" (*c*). It has been held by

(*b*) *Josling v. Kingsford* (1863) 13 C. B. N. S. 447; 134 R. R. 596.

(*c*) *Jones v. Just* (1868) L. R. 3 Q.B. 197, 204, 205 (sale of Manila hemp to arrive). The hemp when shipped by the seller had been damaged by sea water, though not to his knowledge, so

as not to be merchantable. The buyer was held entitled to recover the difference between what it fetched on being resold with all faults and what it would have been worth if shipped in proper condition. As to the position of a buyer who, having the opportunity of inspect-

the High Court of Madras, following the English Law, that when goods are sold by description, there is an implied warranty that the goods shall be of merchantable quality (*d*). 113,1

A special term in the contract providing that inferiority in quality of bulk to sample shall be a matter for allowance does not deprive the buyer of his right to reject goods which do not answer the description in the contract, for he did not undertake to accept goods differing in kind from what he bargained for (*e*).

114.—Where goods have been ordered for a specified purpose, for which goods of the denomination mentioned in the order are usually sold, there is an implied warranty by the seller that the goods supplied are fit for that purpose.

Warranty where goods ordered for a specified purpose.

tion, is content to examine the goods superficially, see *Thorntell & Fehr v. Beers & Son* [1919] 1 K. B. 486 (on a section of the Sale of Goods Act not resembling in its language anything in the present Act).

(*d*) *Peer Mahomed v. Dalooram* (1918) 35 Mad. L. J. 180 (sale of black yarn of Hanuman mark). The goods when shipped by the seller had been damaged by white ants.

(*e*) *Azemar v. Caselle* (1867) L. R. 2 C. P. 431, affirmed in Ex. Ch. *ib.* 677 (contract for cotton guaranteed equal to a sample which was of Longstaple Salem cotton. "Should the quality prove inferior to the guarantee, a fair allowance to be made": the bulk turned out to be not Longstaple Salem, but exceptionally good Western Madras, which, however, is inferior to Longstaple Salem, and cannot be manufactured with the same machinery. The buyer was held not bound to accept). There is a much discussed case of *Parkinson v. Lee* (1802) 2 East, 314; 6 R. R. 429, which at first sight, and according to the head-note, appears to contradict the rules stated in the text.

If it did, it is not law in England, and cannot be of any authority in British India. But in 1868 it was distinguished and approved by a very strong Court, on the ground that the sale was of specific goods (they were hoops, a commodity liable to many accidents and frauds), and "the sample was sound, and the bulk answered the sample at the time of the sale.....the sample was fair; the bulk purchased was ascertained and existing, it did, at the time the bargain was made and the property passed, in fact answer the description in the contract, and was the very thing bargained for, and the secret defect which afterwards developed itself, and made the bulk unmerchantable, was not known to the seller nor caused by any act of his": *Moly v. Gregson*, L. R. 4 Ex. 49, 55, judgment of Ex. Ch. delivered by Willes, J. Some years later Lord Esher, then Sir Balil Brett, said in the Court of Appeal that "either it [*Parkinson v. Lee*] does not determine the extent of a seller's liability on the contract, or it has been overruled": *Randall v. Newson* (1877) 2 Q. B. Div. at p. 106. The true explanation seems

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h. c.

Illustration.

B. orders of A., a copper manufacturer, copper for sheathing a vessel. A., on this order, supplies copper. There is an implied warranty that the copper is fit for sheathing a vessel. [*Jones v. Bright* (1829) 5 Bing. 533; 30 R.R. 728.]

English authorities.—“On the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose” (*f*). For, it is said, in such a case, the real object of the contract is not merely goods of a specified kind, but goods of that kind fit for such use as the buyer is known to contemplate, and goods not fit for such use do not substantially answer the description in the contract (*g*). The seller’s duty on this point is absolute. It does not depend on any question of negligence, nor is it limited to making good such defects as are discoverable by care and skill.

It is a breach of this warranty to supply provisions to a wholesale dealer which, though not actually unwholesome, contain adventitious matter producing effects which alarm the consumer and thereby render the food or drink unmarketable. A firm of distillers agreed to furnish African merchants with whisky coloured to resemble rum. Burnt sugar ought to have been used for this not very laudable but, as between the parties, legally innocent purpose. In fact, logwood was used, and the whisky coloured with it “proved unsaleable, the natives, not unreasonably, fancying it to be poisoned, some of them who tried it having found that it dyed their saliva and other secretions into [*sic*] the colour of blood.” The House of Lords held, on appeal from the Court of Session in Scotland, that the distillers were liable in damages to the merchants (*h*). The only substantial defence was

to be that the case was an application, in very peculiar circumstances, of the principle expressed in s. 116 of the present Act, though perhaps this is of little importance for any Indian purpose.

(*f*) *Jones v. Just*, L. R. 3 Q. B. at p. 203.

(*g*) *Randall v. Newson* (1877) 2 Q.B. Div. 102, 109. *Quere* whether this

deduction be not a little too ingenious; but the rule is so well settled that it is immaterial whether this is or is not the best form of stating the reason.

(*h*) *Macfarlane v. Taylor* (1868) L.R. 1 Sc. & D. 245. See p. 251 for the statutory definition of the law of Scotland, now superseded by the Sale of Goods Act; see *Chalmers* at p. 48.

an attempt to narrow the issue by reference to the language of the contract ; this is now of no interest. S. 114.

The Court of Appeal in England has held by a majority that on a sale of goods by a maker of such goods, who does not otherwise deal in them, there is, in the absence of agreement or custom of trade to the contrary, a warranty that the goods supplied shall be of his own make (i). Perhaps this would be followed in India, but no decision has been found (j).

“Have been ordered”.—It will be observed that the section says : “Where goods *have been ordered* for a specified purpose,” etc. This prevents the rule from extending to the sale of a specific chattel selected or identified by the buyer. “If a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, . . . the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed” (k). The sale of a particular ship, being at the time at sea, “does not imply any contract that it is then seaworthy, or in a serviceable condition” (l). “Where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty.” (m).

It may be that the description of the goods required, as given by the buyer, points to the fact that they are required for a particular purpose, and in such a case it may be a fair inference that the goods

(i) *Johnson v. Raylton* (1881) 7 Q.B. Div. 438. Bramwell, L.J., dissented. This rule is not embodied in the Sale of Goods Act ; see Chalmers at p. 35.

(j) *Bombay United Merchants' Co. v. Doolubram* (see on s. 110, p. 546 above) is not in point, for there was an express undertaking to procure the goods from Europe.

(k) *Brown v. Edgington* (1841) 2 Man. & G. 279 ; 58 R. R. 408.

(l) *Barr v. Gibson* (1838) 3 M. & W.

390, 399 ; 49 R. R. 650, 657, per Parke, B.

(m) *Jones v. Just* (1868) L. R. 3 Q.B. at p. 202, citing *Barr v. Gibson* which shows that the words “capable of being ascertained by either party” do not mean that ascertainment is easy, but that it is not easier for one party than the other ; for in *Barr v. Gibson* the ship—long before the days of ocean cables—was stranded on an island in the Gulf of St. Lawrence.

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114, 115.

are being ordered for that particular purpose. Where, for example, the plaintiff, who was a draper and had no special skill or knowledge with regard to hot-water bottles, went to a chemist who sold such articles and asked for a "hot-water bottle," it was held that the Court might justly infer that the goods were bought and sold for the specific purpose of being used as a hot-water bottle (*n*). So in a sale of milk the jury may reasonably infer that the milk was ordered for the purpose of being consumed as food (*o*).

Warranty on sale
of article of well-
known ascertained
kind.

115.—Upon the sale of an article of a well-known ascertained kind, there is no implied warranty of its fitness for any particular purpose.

Illustration.

B. writes to A., the owner of a patent invention for cleaning cotton, "Send me your patent cotton-cleaning machine to clean the cotton at my factory." A. sends the machine according to order. There is an implied warranty by A. that it is the article known as A.'s patent cotton-cleaning machine, but none that it is fit for the particular purpose of cleaning the cotton at B.'s factory. [*Chanter v. Hopkins* (1838) 4 M. & W. 399, 51 R. R. 650, where the description was "your patent hopper and apparatus, to fit up my brewing copper with your smoke-consuming furnace" (*p*).]

No warranty implied on sale of a specific chattel.—The principle is that the bargain is "for the purchase of a specific chattel, which the buyer himself describes, believing, indeed, that it will answer a particular purpose to which he means to put it; but if it does not, he is not the less on that account bound to pay for it." Accordingly the rule does not cover the case of an executory contract for the supply in bulk of unmanufactured goods, such as coal, though the terms of

(*n*) *Priest v. Last* [1903] 2 K. B. 148.

(*o*) *Frost v. Aylesbury Dairy Co.*
Ltd. [1905] 1 K. B. at p. 612.

(*p*) *Ollivant v. Bayley* (1843) 5 Q. B. 283; 64 R. R. 501, follows this and adds nothing to it. The earlier but very little earlier case of *Barr v. Gibson* (1838) 3 M. & W. 390; 49 R. R. 650 might have raised a similar question, but did not, and on the pleadings could not. What it decided was that a ship

in itself capable of repair, and not a mere wreck, though much damaged and in the circumstances not capable of being made navigable, is still a ship, and is effectually sold and transferred as such between parties ignorant of her condition. The present rule would apply to the sale of a vessel of novel construction which might or might not turn out to be navigable. See also the next following section.

the contract may require them to be of a description known in the trade (g). If it did, a cotton manufacturer who bought cotton by such a description as "Fair Bengal," for the purpose, known to the buyer, of making it into such yarn as is usually made of that kind of cotton, would have no remedy in case of its proving useless, unless he had taken an express warranty. The language of the English Sale of Goods Act, s. 14, sub-s. 1 (f), is more precise: "In the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose"; but it is conceived that there is no substantial difference between the effect of these words and of the present section.

. See.
115-117.

116.—In the absence of fraud and of any express warranty of quality, the seller of an article which answers the description under which it was sold is not responsible for a latent defect in it.

Seller when not
responsible for
latent defect.

Illustration.

A. sells to B. a horse. It turns out that the horse had, at the time of the sale, a defect of which A. was unaware. A. is not responsible for this.

"Latent defect."—This section and the illustration seem intended to give the effect of *Parkinson v. Lee* (see remarks on that case p. 551 n., above), so far as it is still considered good law. If "latent defect" means any defect of which the seller is not aware, and which is not obvious to the buyer, as the illustration rather suggests, it is an extended use of the term. We commonly understand by a latent defect (though it cannot be said to have a fixed meaning as a term of art) a defect such that no practicable examination made with competent skill and care would discover it (see *Readhead v. Midland Ry. Co.* (r), *passim*).

117.—Where a specific article, sold with a warranty, has been delivered and accepted, and the warranty is broken, the sale is not thereby

Buyer's right on
breach of warranty.

(g) *Gillespie Bros. & Co. v. Cheney*,
Eggar & Co. [1896] 2 Q. B. 59.

(r) L. R. 2 Q. B. 412; 4 Q. B. 379.

- s. 117. rendered voidable, but the buyer is entitled to compensation from the seller for loss caused by the breach of warranty.

Illustration.

A. sells and delivers to B. a horse warranted sound. The horse proves to have been unsound at the time of sale. The sale is not thereby rendered voidable, but B. is entitled to compensation from A. for loss caused by the unsoundness. [*Street v. Blay* (1831) 2 B. & Ad. 456, 36 R. R. 626; but the English rule, which since that case has been treated as settled, is that the purchaser cannot avoid the sale of a specific chattel, except under a condition in the contract or for fraud, after property has passed, and property may, and often does, pass before delivery and acceptance. See as to this *Heilbutt v. Hickson* (1872) L. R. 7 C. P. at p. 449. In such case a simple warranty does not entitle the purchaser, at common law, to refuse to accept the goods because the warranty is not fulfilled. It must be presumed that the language of the present section was deliberately chosen, especially as it varies from that of the original draft, which read "where a specific article has been sold with a warranty, and the warranty is broken," etc.]

Consequences of breach of warranty: 1. Where a specific article is sold.—The law is undoubted, but it is not always easy to determine whether a condition or a mere warranty is intended by the parties. A clause that goods shall be similar to samples may be one or the other "Generally speaking, when the contract is as to any [i.e., unascertained] goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral to the contract, and is the subject of a cross action, or matter in reduction of damages" (s).

Similarly it was observed by the Calcutta High Court that where the property in goods had passed to the purchaser, and there had been part delivery, he could rescind the sale only if he could show fraud or misrepresentation within the provisions of s. 19 (p. 124 above) (t). The Court thought, however, that the case did not fall within s. 117 at all, because the sale was not of a specific article in the sense of that section, and that, since the goods (the whole of the rice in a specified gola of the plaintiffs) were ascertained, only the last paragraph of s. 118 was applicable. It does not seem obvious that the words "specific article," as used in the present section, though perhaps not the

(s) *Heyworth v. Hutchinson* (1867)
L. R. 2 Q. B. 447, 451.

(t) *Shoshi Mohun Pal v. Nobo Kristo*
(1878) 4 Cal. 801, 806.

most apt, are not wide enough to cover any goods that are in fact ascertained. At any rate a horse, which is not commonly called an article by English-speaking people, is within the section, as the illustration shows. 8s, 117, 18.

A breach of warranty within the meaning of this section corresponds exactly to a breach of warranty within the strict meaning of warranty as used in the Sale of Goods Act.

118.—Where there has been a contract, with a warranty, for the sale of goods which, at the time of the contract, were not ascertained or not in existence, and the warranty is broken, the buyer may—

accept the goods or refuse to accept the goods when tendered,

or keep the goods for a time reasonably sufficient for examining and trying them, and then refuse to accept them ; provided that during such time he exercises no other act of ownership over them than is necessary for the purpose of examination and trial (*u*).

In any case the buyer is entitled to compensation from the seller for any loss caused by the breach of warranty ; but, if he accepts the goods and intends to claim compensation, he must give notice of his intention to do so within a reasonable time after discovering the breach of the warranty.

Illustrations.

(a) A. agrees to sell and, without application on B.'s part, deliver to B. 200 bales of unascertained cotton by sample. Cotton not in accordance with sample is delivered to B. B. may return it if he has not kept it longer than a reasonable time for the purpose of examination.

(b) B. agrees to buy of A. twenty-five sacks of flour by sample. The flour is delivered to B., who pays the price. B., upon examination, finds

(*u*) It is a question of fact whether an act which is on the face of it an act of ownership and nothing else does or does not exceed what is necessary for this purpose. See *Parker v. Wallis* (1855) 5 E. & B. 21 ; 103 R. R. 341, a case on acceptance under the Statute of Frauds.

S. 118.

it not equal to sample; B. afterwards uses two sacks, and sells one. He cannot now rescind the contract and recover the price, but he is entitled to compensation from A. for any loss caused by the breach of warranty.

(c) B. makes two pairs of shoes for A. by A.'s order. When the shoes are delivered, they do not fit A. A. keeps both pairs for a day. He wears one pair for a short time in the house, and takes a long walk out of doors in the other pair. He may refuse to accept the first pair, but not the second. But he may recover compensation for any loss sustained by the defect of the second pair.

2. Where goods not ascertained at the time of contract.—The matter of this section is well-settled law in England. On a sale of goods not specific, the buyer may reject them if, upon examination within a reasonable time, he finds them not to be as warranted (*v*); but if he does not reject them, he may none the less rely on the breach of warranty as against the seller suing for the price (*w*), and set off his damages against the price as far as they go (*x*), or he may bring a distinct action for any damage sustained by reason of the breach of warranty, notwithstanding that he has already paid the full price (*y*). Where the seller's default amounts to a breach of condition or total failure to perform the contract, a term expressly excluding warranty does not affect the seller's right to recover damages (*z*).

Where goods inferior to the quality contracted for have been delivered and accepted, the measure of the damages to which the buyer is entitled is the difference between what the goods delivered are worth on arrival and what they would have been worth if according to contract (*a*). Where the buyer has ordered the goods for a purpose which is not expressly or by implication communicated to the seller, he cannot recover as damages an additional sum for loss sustained owing to the goods not being fit for such purpose (*b*).

As to what is reasonable time for examining the goods is a question of fact depending on the circumstances of each case (*c*).

(*v*) *E.g., Heilbutt v. Hickson* (1872) L. R. 7 C. P. 438.

(*w*) *Mondel v. Steel* (1841) 8 M. & W. 858; 58 R. R. 890; Sale of Goods Act, s. 53.

(*x*) Defective quality may render the goods quite worthless: *Poulton v. Lattimore* (1829) 9 B. & C. 259; 32 R. R. 673.

(*y*) *Davis v. Hedges* (1871) L. R. 6 Q. B. 687.

(*z*) *Wallis, Son & Wells v. Pratt & Haynes* [1911] A. C. 394.

(*a*) *Jones v. Just* (1868) L. R. 3 Q. B. 197, 201.

(*b*) *Bostock & Co. v. Nicholson and Sons* [1904] 1 K. B. 725.

(*c*) *Kissendoyal v. Askaran* (1916) 23 Cal. L. J. 415, 422.

Unless there is something in the contract to the contrary, a buyer cannot be compelled to take non-specific goods with an allowance for inferiority in quality. But if the right to reject the goods as being of an inferior quality is not exercised by the purchaser when the goods are tendered, but a right of a proprietary character in respect of the goods is exercised by directing delivery to be made to third parties then the buyer accepts the goods (*d*). Where the goods actually delivered are not of the quality stipulated for, evidence is not admissible of a custom of the trade which requires the buyer to accept the goods with an allowance for inferior quality, such a custom being inconsistent with the express terms of the contract (*e*).

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118, 119

When a buyer rejects goods as not equal to sample or otherwise not being as warranted, it is not his duty to send them back to the seller; it is enough for him to give a clear notice that they are not accepted, and then they are at the seller's risk (*f*). He is not bound to put himself to the expense and trouble of returning the goods, and it is the seller's business to take away the goods if he is so minded (*g*).

The word "warranty" is used in this section in the wide sense of the "condition" of the Sale of Goods Act.

Miscellaneous.

119.—When the seller sends to the buyer goods not ordered with goods ordered, the buyer may refuse to accept any of the goods so sent, if there is risk or trouble in separating the goods ordered from the goods not ordered.

When buyer may refuse to accept, if goods not ordered are sent with goods ordered.

(*d*) *Haridas v. Kalamull* (1903) 30 Cal. 649. We take the statement of the point from the head-note. In fact, there was an express term that, in case of inferior quality, the buyer should take the goods subject to an allowance to be fixed; but the Court thought the buyer had by his conduct waived his right to reject the goods, if he had any, for the reason given in the text, and therefore did not formally decide

on the conflicting evidence as to quality.

(*e*) *Ruttonsi Ronaji v. The Bombay United Spinning & Weaving Co., Ltd.* (1917) 41 Bom. 518, 538—540.

(*f*) *Grimoldby v. Wells* (1875) L. R. 10 C. P. 391 (treated as not really arguable); *Sumer Chand v. Ardeshir* (1907) All. W. N. 67.

(*g*) *Phuggu Mal v. Babu Lal* (1913) 35 All. 325.

8s.
119, 120.

Illustration.

A. orders of B. specific articles of china. B. sends these articles to A. in a hamper, with other articles of china which had not been ordered. A. may refuse to accept any of the goods sent. [*Levy v. Green* (1859) 8 E. & B. 575; 1 E. & E. 969; 112 R. R. 699; 117 R.R. 552.]

Where goods not ordered are sent with goods ordered.—So where a contractor for the supply of coal sent coals partly according to contract and partly not, and mixed them all together in delivery, it was held that the whole of the quantity so delivered must be considered not according to contract (*h*).

“ I do not say that in all cases where the goods ordered are sent together with others not ordered the vendee would have a right to refuse to accept any; but if there is any danger or trouble attending the severance of the two, or any risk that the vendee might be held to have accepted the whole if he accepted his own, he is at liberty . . . to refuse to accept at all ” (*i*).

The rule is the same where the goods sent are of the kind ordered, but in excess of the quantity; here there is the additional reason that no goods can be said to have been appropriated to the contract. “ The delivery of fifteen hogshcads, under a contract to deliver ten, is no performance of that contract, for the person to whom they are sent cannot tell which are the ten that are to be his; and it is no answer to the objection to say that he may choose which ten he likes, for that would be to force a new contract upon him ” (*j*).

120.—If a buyer wrongfully refuses to accept the goods sold to him, this amounts to a breach of the contract of sale.

Effect of wrongful refusal to accept.

Compare ss. 39 and 51, pp. 277, 308 above. This section is only a particular case of a much wider principle, which gives a right of action in damages to one party to a contract if and when the other party clearly shows his intention not to be bound by and to

(*h*) *Nicholson v. Bradfield Union* E. & E. at p. 976; 117 R. R. 555, 556 (1866) L. R. 1 Q. B. 620.
(*j*) *Cunliffe v. Harrison* (1851) 6 Ex. 903, 906; 86 R. R. 543, per Parke, B.
; Byles, J., in *Levy v. Green* 1

repudiate the contract. The general principle, which applies in sale as in all other contracts, was thus expressed by Cockburn, C.J. :—

“ The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed and then hold the other party responsible for all the consequences of non-performance but in that case he keeps the contract alive for the benefit of the other party as well as his own ; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

“ On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it ; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his damage” (k).

What is really more important than anything expressed in the terms of this section is that the principle applies when the buyer, after accepting part of the goods, refuses to accept any more. The refusal need not be express, but may be inferred from the conduct of the buyer and all the circumstances of the case. Where the buyer of straw, which was to be delivered in instalments and paid for on delivery, said to the seller “ You may bring your straw, but I will not pay you upon delivery as under the contract I ought to do. I will always keep one bundle of straw in hand so as to have a check upon you,” it was held he had shown an intention to repudiate the contract, and that the buyer might treat it as at an end (l). So if one party by his conduct

(k) *Frost v. Knight* (1872) L. R. 7 Ex. at pp. 112, 113. See for application to contract of sale *Cort v. Ambergate Ry. Co.* (1851) 17 Q. B. 127 ; 85 R. R. 369 ; *Honck v. Muller*, 7 Q. B. D. 92 ; *Braithwaite v. Foreign Hardwood Co.* [1905] 2 K. B. 543.

(l) *Withers v. Reynolds*, 2 B. & Ad.

892, as approved by the House of Lords in *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Ca. at p. 442, and see *Planché v. Colburn* (1831) 8 Bing. 14 ; *Hoare v. Rennie* (1859) 5 H. & N. 19 ; 120 R. R. 453 ; *Hochster v. De la Tour* (1853) 2 E. & B. 678 ; 95 R. R. 747.

§. 120. makes it impossible for himself to perform his contract, that is a sufficient repudiation (*m*). A mere refusal to pay for one or more instalments of goods, to be delivered by instalments at stated times and paid for on delivery, unaccompanied by any other act, does not amount to a repudiation of the contract. In each case all the circumstances have to be considered in determining whether there is evidence on which a jury may find that there has been a refusal to accept, or a repudiation of the contract (*n*). In such case the seller is not bound to tender the residue of the goods; he need not make or offer goods which he knows the buyer will refuse. Readiness and willingness to perform one's contract may exist without an overt act of performance which in the circumstances would be useless (*o*).

The measure of damages is not affected by the date of the buyer's refusal to accept. It is fixed by the difference between the contract price of the goods and the market price on the day when they ought to have been accepted (*p*) or the several days if the delivery was to be by instalments, as in the converse case of refusal to deliver; the plaintiff is to be put, as near as may be, in the same condition as if the contract had been performed (*q*). And this is so even if, by reason of the plaintiff electing to treat the defendant's refusal as an immediate breach (see s. 32, p. 254 above), the cause of action is complete before the time fixed for performance has expired. "The election to take advantage of the repudiation of the contract goes only to the question of breach, and not to the question of damages." It will be ground for mitigation of damages, however, if the defendant can show that the

(*m*) *Ford v. Tiley* (1827) 6 B. & C. 325; 30 R. R. 339; *Lovelock v. Franklyn* (1846) 8 Q. B. 371; 70 R. R. 520.

(*n*) *Freeth v. Barr* (1874) L. R. 9 C. P. 208; *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 App. Ca. 434; *Cornwall v. Henson* [1900] 2 Ch. 298.

(*o*) *Cort v. Ambergate Ry. Co.* (1851) 17 Q. B. 127; 85 R. R. 369.

(*p*) *Philpotts v. Evans* (1839) 5 M. & W. 475; 52 R. R. 802.

(*q*) Where the plaintiff has waited to

bring his action until the time of completion has elapsed, the measure of damages is the sum of the several items of damage sustained at each of the dates when a delivery should have been made under the contract: Not a total sum estimated at the due date of the final instalment, as was suggested arg. in *Brown v. Muller* (1872) L. R. 7 Ex. 319; the decision there following earlier authority, was as stated. And see *Bilasi-ram v. Gubbay* (1916) 43 Cal. 305.

plaintiff might have diminished his loss by going into the market on the day of breach and making a forward contract at the then market price (*r*). It is no ground for mitigation that the buyer after he has repudiated the contract discovers that the goods tendered were not in accordance with the description contained in the contract (*s*). See note to illustration (*h*) to section 73, above.

The damages are to be calculated with reference to the date of breach only where no time was fixed for acceptance (*t*); for then there is no other measure possible.

121.—When goods sold have been delivered to the buyer, the seller is not entitled to rescind the contract on the buyer's failing to pay the price at the time fixed unless it was stipulated by the contract that he should be so entitled.

Right of seller
to rescission on
failure of buyer to
pay price at time
fixed.

[*Martindale v. Smith* (1841) 1 Q. B. 389; 55 R.R. 285. The seller's lien on the goods while they remain in his possession is of course unaffected by this rule.]

If, however, the contract has been induced by fraud, the seller on receiving notice of the fraud may disaffirm the contract and retake possession of goods which have been delivered under the contract (*u*). But where the vendor has been induced to enter into the contract by an innocent misrepresentation, the Court will not grant rescission after the contract has been executed (*v*).

122.—Where goods are sold by auction, there is a distinct and separate sale of the goods in each lot, by which the ownership thereof is transferred as each lot is knocked down.

Sale and transfer
of lots sold by
auction.

This is so in England even if there is a condition of sale that goods are not to be removed before payment. Such a condition does not prevent the buyer to whom a lot has been knocked down from reselling

(*r*) *Roper v. Johnson* (1873) L. R. 8 C. P. 167, 180, 183.

(*s*) *Braithwaite v. Foreman Hardwood Co.* [1905] 2 K. B. 543.

(*t*) Sale of Goods Act, s. 50 (3). We cannot find any judicial authority, but it is obvious common sense.

(*u*) *Re Eastgate, Ex parte Ward* [1905] 1 K. B. 465.

(*v*) *Seddon v. North Eastern Salt Co.* [1905] 1 Ch. 326; but former decisions

are not uniform and the point is not thoroughly settled.

§s.
2, 123.

the goods forthwith (*w*). The rule itself is well settled (*x*). It might, no doubt, be excluded by clear evidence of a contrary intention, and the more guarded language of the English Sale of Goods Act provides for this.

As to the speculative doctrine, for which there is some English authority (*y*), that, where a sale by auction is announced to be without reserve, a preliminary contract arises between the vendor and the highest bidder that the latter shall be the purchaser, see p. 56 above. Unless a right to bid is expressly reserved to the seller, neither he nor anyone on his behalf may bid, and the auctioneer may not knowingly receive such a bid. Any sale contravening this rule may be treated as fraudulent by the buyer (*z*).

An auctioneer has ostensible authority to sell without reserve, and if, after a bid is accepted, the seller sets up a restriction of the auctioneer's authority which was not disclosed at the time, the buyer's remedy is not against the auctioneer for breach of warranty of authority, but against the seller on the contract of sale (*a*).

Effect of use by
seller of pretended
biddings to raise
price.

123.—If, at a sale by auction, the seller makes use of pretended biddings to raise the price, the sale is voidable at the option of the buyer.

This reproduces the Common Law (*b*). Formerly there was a different rule in equity as to sales of land, though its extent was not perfectly settled. In 1867 the rule of equity was practically assimilated by statute to that of the Common Law Courts. The details of this odd little discrepancy, in which we find common law stricter on a question of fraud than equity, seem to be of no interest whatever in India; we therefore refer any curious reader to the English text books (*c*).

(*w*) *Scott v. England* (1844) 2 B. (3), (4).
& L. 520; 69 R. R. 868.

(*x*) *Emmerson v. Heelis* (1809) 2 Taunt. 38; 11 R. R. 520; *Roots v. Lord Dormer* (1832) 4 B. & Ad. 77; 38 R. R. 231; Sale of Goods Act, s. 58 (1).

(*y*) See *Johnston v. Boyes* [1899] 2 Ch. 73.

(*z*) Sale of Goods Act, 1893, s. 58

(*a*) *Rainbow v. Hawkins* [1904] 2 K. B. 322.

(*b*) *Green v. Baverstock* (1893) 14 C. B. N. S. 204, 135 R. R. 657; Sale of Goods Act, s. 58 (3).

(*c*) Chalmers on Sale of Goods, 136, or Pollock on Contract, 595.

CHAPTER VIII.

S. 124.

OF INDEMNITY AND GUARANTEE.

124.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a “contract of indemnity.”

“Contract of indemnity defined.”

Illustration.

A. contracts to indemnify B. against the consequences of any proceedings which C. may take against B. in respect of a certain sum of 20 rupees. This is a contract of indemnity.

Indemnity.—English usage of the word “indemnity” is much wider than this definition. It includes promises to save the promisee harmless from loss caused by events or accidents which do not or may not depend on the conduct of any person, or by liability arising from something done by the promisee at the request of the promisor ; in the latter case a promise of indemnity may be inferred as a fact from the nature of the transaction (*d*). “Where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction or demand of another . . . and without any default on his own part acts in a manner which is apparently legal but is, in fact, illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty” (*e*). So Lord Davey stated one important application of the principle in the House of Lords. Bankers had innocently presented to a corporation a transfer of its own stock for registration, and transferees for value from them were registered as owners. The transfer to the bank turned out to be a forgery, and the true owner, in an action against the corporation, enforced restitution. The House of Lords, disagreeing with the Court of Appeal, held that the bankers must indemnify the corporation.

(*d*) *Dugdale v. Levering* (1875) L. R. 10 C. P. 196.

(*e*) *Sheffield Corporation v. Barclay* [1905] A. C. 392, 39.

8s.
124, 125.

Some good company lawyers regret the decision, thinking that the corporation's duty was not merely ministerial, since it was the guardian of its own register, having a discretion to make inquiries if thought fit, and "in theory a company is bound to exercise an active supervision to keep its register correct" (f). Again we say that a contract of insurance is a kind of contract of indemnity. But this language would, since the Contract Act, be improper in India (g).

The present chapter applies in terms only to express promises; but it should be noted that a duty to indemnify may be annexed by operation of law to various particular kinds of contract (cp. s. 69, p. 374, above). On the sale of shares in a company the transferee is bound to indemnify the transferor "against future calls, whether made by the company or by a liquidator. The liability of the transferor in the event of a winding up is exactly analogous to the case of lessee and assignee, the former of whom is liable for breaches of covenant committed by the latter, but, being only secondarily liable, has his remedy over against the person primarily liable, the assignee. That is the case of *Moule v. Garrett*" (h). The same Judge had said in the case cited by him (i): "Where a party is liable at law by immediate privity of contract, which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant, the former is entitled to be indemnified by the latter in respect of the performance of the obligation."

125.—The promisee in a contract of indemnity, acting

Rights of indemnity-holder when sued.

within the scope of his authority, is entitled to recover from the promisor—

(1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

(f) L. Q. R. xxii. 4, 5.

(g) See the Transfer of Property Act IV of 1882, s. 49, as to the rights of a transferee of immovable property under a fire policy.

(h) *Roberts v. Crowe* (1872) L. R. 7 C. P. 629, 637, per Willes, J. See also *Kellock v. Enthoven* (1874) L. R. 9 Q.

B. 241, Ex. Ch. Authorities of this class, however, are too much implicated with the special provisions of the English Companies Acts to be generally instructive for the present purpose.

(i) *Moule v. Garrett*, Ex. Ch. (1872) L. R. 7 Ex. 101, 104.

(2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit ;

(3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorised him to compromise the suit.

Sub-s. 1.—This section represents the English law, which is best summarised in the notes to *Lampleigh v. Brathwait* in Smith's Leading Cases (j). As to sub-s. 1, "it is obvious that when a person has . . . altered his position in any way on the faith of a contract of indemnity, and an action is brought against him for the matter against which he was indemnified, and a verdict of a jury obtained against him, it would be very hard indeed if when he came to claim the indemnity the person against whom he claimed it could fight the question over again, and run the chance of whether a second jury would take a different view and give an opposite verdict to the first. Therefore, by reason of that contract of indemnity, the judgment is conclusive," although the promisor was no party to it (k). This rule has been followed by the Indian Courts (l).

Sub-s. 2.—As to sub-s. 2, "in the case of contracts of indemnity, the liability of the party indemnified to a third person is not only contemplated at the time of indemnity, but is the very moving cause of that contract ; and in cases of such a nature there is a series of authorities to the effect that costs reasonably incurred in resisting or reducing or ascertaining the claim may be recovered" (m). But the costs must be such as would have been incurred by a prudent man (n).

(j) Vol. I. 154, 155, 11th ed.

(m) *Pepin v. Chunder Seekur Mooker-*

(k) *Parker v. Lewis* (1873) L. R. 10 Ch. 1035, 1059, per Mellish, L.J.

jee (1880) 5 Cal. 811.

(l) *Nallappa v. Vridhachala* (1914)

(n) *Gopal Singh v. Bhawani Prasad*

(1888) 10 All. 531.

37 Mad. 270.

8s.
i, 126.

The rule in England is settled to this effect; it is applied, indeed, to the case of a man who has failed to perform his contract through breach of a sub-contract, if he sues the sub-contractor, although there is no agreement to indemnify the contractor, and the question is regarded as being of the measure of damages only (*o*). The costs recoverable, in a proper case, are not confined to the taxed costs (*p*).

Sub-s. 3.—As to sub-s. 3, “if a person has [expressly] agreed to indemnify another against a particular claim or particular demand, and an action is brought on that demand, he [the defendant] may then give notice to the person who has agreed to indemnify him to come in and defend the action, and if he does not come in, and refuses to come in, he may then compromise at once on the best terms he can, and then bring an action on the contract of indemnity” (*q*).

Rights of promisor.—This section deals with the rights of a *promisor* in a contract of indemnity. There is no provision in the Act for the rights of a promisor in such a contract. The absence, however, of such a provision does not take away the rights which such a promisor has according to English Law, and which are analogous to the rights of a surety declared in s. 141. Those rights constitute an essential part of the law of indemnity, and they are of general application, as they are based on natural equity (*r*).

126.—A “contract of guarantee” is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the “surety”; the person in respect of whose default the guarantee is given is called the “principal debtor,” and the person to whom the guarantee is given is called the “creditor.” A guarantee may be either oral or written.

(*o*) *Hammond & Co. v. Bussey* (1887) R. 6 Ex. 43.
 20 Q. B. Div. 79; *Agius & Co. v. Great Western Colliery Co.* [1899] 1 Q. B. 413, (q) Mellish, L. J., L. R. 8 Ch. at p. 1059.
 both in C. A.; and see p. 404, above, (r) See *Maharana Shri Jasvatsingji Fatesingji v. The Secretary of State for India* (1889) 14 Bom. 299, 303.
 on s. 73, (p) *Howard v. Lovegrove* (1870) L.

The contract of guarantee supposes a principal debtor (s); the surety's obligation must be substantially dependent on a third person's default (t). A promise to be primarily and independently liable is not a guarantee, though it may be an indemnity (u). In England, however, the distinction is material chiefly, if not wholly, because a guarantee is within the Statute of Frauds, and therefore not actionable without such a "memorandum or note" as is required by s. 4 of that Act; whereas the present section expressly declares that an oral guarantee is not less valid than a written one.

See
126, 127.

The mere transfer by a debtor of his property to a trustee for the benefit of his creditors, the trustee not undertaking any personal liability to the creditors, does not constitute the relation of principal and surety as between the debtor and the trustee (v).

A person may become a surety without the knowledge and consent of the principal debtor, but the only rights which he acquires in that case are those given by ss. 140 and 141, and not those given by s. 145 (w).

"Liability."—By the word "liability" in this section is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee. A surety, therefore, is not liable on a guarantee for the payment of a debt which is barred by the law of limitation (x).

127.—Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

Consideration for
guarantee.

Illustrations.

(a) B. requests A. to sell and deliver to him goods on credit. A. agrees to do so, provided C. will guarantee the payment of the price of the goods. C. promises to guarantee the payment in consideration of

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| <p>(s) <i>Mountstephen v. Lakeman</i> (1871) L. R. 7 Q. B. 196, 202, Ex. Ch., affirmed in House of Lords, L. R. 7 H. L. 17.</p> <p>(t) <i>Harburg India Rubber Comb Co. v. Martin</i> [1902] 1 K. B. 778, C.A.</p> <p>(u) <i>Guild & Co. v. Conrad</i> [1894] 2 Q. B. 885.</p> | <p>(v) <i>Arunachellam Chetti v. Subramanian Chetti</i> (1907) 30 Mad. 235.</p> <p>(w) <i>Muthu Raman v. Chinna Vallayan</i> (1918) 39 Mad. 965.</p> <p>(x) <i>Manju Mahadev v. Shivappa</i> (1918) 42 Bom. 444.</p> |
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§. 127.

A.'s promise to deliver the goods. This is a sufficient consideration for C.'s promise.

(b) A. sells and delivers goods to B. C. afterwards requests A. to forbear to sue B. for the debt for a year, and promises that, if he does so, C. will pay for them in default of payment by B. A. agrees to forbear as requested. This is a sufficient consideration for C.'s promise.

(c) A. sells and delivers goods to B. C. afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Consideration for a contract of guarantee.—This is nothing but an application of the wider principle that in all cases of contract the really necessary element of consideration is the legal detriment incurred by the promisee at the promisor's request, and it is immaterial whether there is or is not any apparent benefit to the promisor (*y*) (see p. 204, above).

Like any other contract, a contract of suretyship may be invalidated by total failure of the consideration, as where the consideration for an intended guarantee was postponing the sale of the debtor's goods, but the creditor was unable to stop the sale for want of the consent of other necessary parties (*z*), or where the consideration was withdrawal of a criminal prosecution against the debtor, but the Court would not sanction the withdrawal, the offence being non-compoundable (*a*).

Where A. advanced money to B. on a bond hypothecating B.'s property, and mentioning C. as surety for any balance that might remain due after realisation of B.'s property, and C. was no party to the bond, but signed a separate surety bond two days subsequent to the advance of the money, it was held that the subsequent surety bond was void for want of consideration (*b*). In this case it was said that illustration (*c*) could be good law only on the assumption that there was no privity between C. and B., and that C. acted merely as a volunteer (*c*); but this appears to be exactly what the illustration

(*y*) *Sornalinga v. Pachai Naickan* 1 All. 487.

(1915) 38 Mad. 680.

(*z*) *Cooper v. Joel* (1859) 1 D. F. & J. 240.

(*a*) *Het Ram v. Devi Prasad* (1881) 1 All. W. N. 2.

(*b*) *Nanak Ram v. Mehin Lal* (1877)

(*c*) *Ib.* p. 496. The remark occurs in the course of a somewhat captious depreciation of the utility of illustrations in general, which even suggests that the illustrations are not authoritative.

says. Again, the mere fact that A. lends money to B. on the recommendation of C. is no consideration for a subsequent promise by C. to pay the money in default of B. (d).

8a.
127, 128

This section does not, of course, exclude the possibility of other kinds of consideration. However, lending money or supplying goods to the principal debtor and forbearing to sue him (e) are by far the commonest forms of consideration for a surety's contract. In India forbearance to execute a decree against the debtor is also a common form (f).

128.—The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.

Illustration.

A. guarantees to B. the payment of a bill of exchange by C., the acceptor. The bill is dishonoured by C. A. is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it. [*Ackermann v. Ehrensperger* (1846) 16 M. & W. 99: "I entertain no doubt that a party who guarantees the payment of a bill is liable for all that the principal would be liable for," per Pollock, C.B., at p. 103.]

Additional Illustration.

[A. guarantees to B. the payment of rent becoming due from B. to C. B. fails to pay the rent. A. is liable for the rent, but not for interest on the rent, unless the bond contained some such words as "with interest thereon": *Maharaja of Benares v. Har Narain Singh* (1906) 28 All. 25.]

Proof of surety's liability.—The liability must be proved against the surety in the same way as against the principal debtor. A judgment or award against the principal is not admissible as against the surety without a special agreement to that effect: "In an action against a surety the amount of the damage cannot be proved by any admissions of the principal" (g). The present section is merely a re-enactment of the common law (h).

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| (d) <i>Muthukaruppa v. Kathappudayan</i> (1914) 27 Mad. L. J. 249. | <i>Singh</i> (1887) All. W. N. 52. |
| (e) As to this see <i>Coles v. Pack</i> (1869) L. R. 5 C. P. 65. | (g) <i>Ex parte Young</i> (1881) 18 Ch. Div. 668, 671. |
| (f) <i>Narain Singh v. Mata Prasad</i> | (h) <i>Hajarimal v. Krishnarav</i> (1881) 5 Bom. 647, 650. |

28. Liability for whole or part of debt.—There is an important distinction to be observed as to guarantees limited in amount. A man may make himself a surety, “with a limit on the amount of his liability, for the whole of a debt exceeding that limit”; and a guarantee of limited amount for an ascertained debt is presumed to be a guarantee for the whole.

But “where the surety has given a continuing guarantee, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guarantee is as between the surety and the creditor to be construed, both at law and in equity, as applicable to a part only of the debt co-extensive with the amount of his guarantee, and this upon the ground, at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance or not, to increase it at the expense of the surety” (i). Evidence of contrary intention is of course admissible in either case. But, in the absence of such evidence, the surety who has guaranteed the whole debt with a limit of his liability does not acquire any rights of subrogation or contribution (see ss. 140, 141, 146, pp. 598, 601, 611, below) until he has paid up to that limit, whereas the guarantor of a floating balance up to a limited amount is deemed to be surety only for that part of the debt, and is entitled to the benefit, in rateable proportion, of any dividends paid by the estate of the principal debtor.

Thus where A. guaranteed Z. against trade debts to be contracted by M. “as a running balance of account to any amount not exceeding £400,” and M. became indebted to Z. for £625 and made a composition with his creditors for 8s. 7d. in the pound, leaving a balance of £365 due to Z., it was held that, as between A. and Z., A. was entitled to deduct from that balance the amount of the dividend paid upon £400, the maximum of A.’s guarantee, and was liable to Z. only for the difference. For the guarantee was on its true construction only a guarantee for £400, part of M.’s entire debt to Z., not a guarantee for an unknown amount with liability limited to £400; and, that being so, the dividend paid by M. was to be applied rateably in reduction of every part of the debt, and the liability of A. on the part for which he had undertaken

(i) *Ellis v. Emanuel* (1876) 1 Ex. Div. 157, 163, *Cur. per Blackburn, J.*

was diminished accordingly (j). In a later case, held to be indistinguishable from this, it was said: "If a person guarantees a limited portion of a debt, all the authorities show that if he pays that portion he has in respect of it all the rights of a creditor. The question is whether the guarantor means 'I will be liable for £250 of the amount which A. B. shall owe you,' or 'I will be liable for the amount which A. B. shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250. . . .'" It is true that a surety may enter into an obligation to be liable to a limited amount for the ultimate balance remaining after all moneys obtainable from other sources have been applied in reduction of the debt." But such an intention ought to be clearly expressed (k).

A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety, though the principal has not been sued (l).

Surety's liability where original contract is void or voidable.—This section only explains the *quantum* of a surety's obligation when the terms of the contract do not limit it, as they often do. It does not follow, conversely, that a surety can never be liable when the principal debtor cannot be held liable. Thus a surety is not discharged from liability by the mere fact that the contract between the principal debtor and creditor was voidable at the option of the former, and was avoided by the former. And where the original agreement is void, as in the case of a minor's contract in India, the surety is liable as a principal debtor; for in such a case the contract of the so-called surety is not a collateral, but a principal, contract (m).

In the case of an agreement guaranteeing an employer against loss by the misconduct of a person employed as agent of the guarantor,

(j) *Barclay v. Lydall* (1831) 7 Bing. 489; 33 R. R. 540.

(k) *Hobson v. Bass* (1871) L. R. 6 Ch. 792, 794 (Lord Hatherley); *cp.* 1 Ex. Div. 168.

(l) *Sankana v. Virupakshapa* (1883) 7 Bom. 146; *Lachman v. Bapu* (1889) 6 Bom. H. C. A. C. 241; *Totakot v.*

Kurusungal (1869) 4 M. H. C. 190; *Karim Bakhsh v. Bithul Das* (1882) All. W. N. 132; *Inayatullah v. Rani* (1886) All. W. N. 306.

(m) *Kashila v. Shripat* (1894) 19 Bom. 697; *Sohan Lal v. Puran Singh* (1916) Punj. Rec. no. 54, p. 165.

18. the loss to be recoverable in a suit against the guarantor must be shown to have arisen from misconduct on the part of the agent in connection with the business of the agency, and to be within the scope of the agreement (n).

Administration and surty bonds.—The liability of sureties under an administration bond does not depend on the validity or invalidity of the grant. Nor is the bond void merely because administration was obtained by misrepresentations of which neither the Court nor the sureties were aware (o). The same principle applies to surety bonds passed under the Guardian and Wards Act (p). See notes to s. 20, p. 133 above.

Limitation.—This section must be read together with the Limitation Act, and not so as to nullify its provisions limiting the time within which a suit must be brought after the accrual of a cause of action. The payment of interest, therefore, by a debtor before the expiration of the period of limitation does not give a fresh starting point for limitation against the surety under s. 20 of the Limitation Act even in the absence of a prohibition by the surety against the payment of interest by the debtor on his account. Payment of interest by the debtor could not be regarded as made by a person liable to pay the surety's debt, nor can the surety be, for the purposes of that section, considered the agent of the principal duly authorised to pay the interest (q). "The fact that the interest was paid with the knowledge and consent of the surety and even at his request, makes no difference unless the circumstances could be said to render the payment one on behalf of the surety" (r).

See also the commentary on s. 134, p. 588 below.

(n) *Sri Kishen v. The Secretary of State for India in Council* (1885) 12 Cal. 143. This was a case on the construction of an undertaking in the nature of a "fidelity guarantee" on very peculiar facts; the Contract Act is not referred to at all.

(o) *Debendra Nath Dutt v. Administrator-General of Bengal* (1906) 33 Cal. 713; (1908) 35 Cal. 953; L. R. 35 Ind. Ap. 109 (P. C.)

(p) *Sarat Chandra Roy v. Rajoni Mohan Roy* (1908) 12 C. W. N. 481.

(q) *Gopal Daji v. Gopal Bin Sonu* (1903) 28 Bom. 248.

(r) *Brajendra Kishore v. Hindustan Co-operative Insurance Society Ltd.* (1917) 44 Cal. 978, 993.

"Continuing
guarantee."

129.—A guarantee which extends to a series of transactions is called a "continuing guarantee." S. 129.

Illustrations.

(a) A., in consideration that B. will employ C. in collecting the rents of B.'s zamindari, promises B. to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C. of those rents. This is a continuing guarantee.

(b) A. guarantees payment to B., a tea-dealer, to the amount of £100, for any tea he may, from time to time, supply to C. B. supplies C. with tea to above the value of £100, and C. pays B. for it. Afterwards B. supplies C. with tea to the value of £200. C. fails to pay. The guarantee given by A. was a continuing guarantee, and he is accordingly liable to B. to the extent of £100 [facts simplified from *Wood v. Priestner* (1867) 1 L. R. 2 Ex. 66, 282].

(c) A. guarantees payment to B. of the price of five sacks of flour, to be delivered by B. to C., and to be paid for in a month. B. delivers five sacks to C. C. pays for them. Afterwards B. delivers four sacks to C. which C. does not pay for. The guarantee given by A. was not a continuing guarantee, and accordingly he is not liable for the price of the four sacks. [*Kay v. Groves* (1829) 6 Bing. 276.]

Continuing guarantee.—Whether in a particular case a guarantee is continuing or not is a question of the intention of the parties, "as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written" (s). Surrounding circumstances must be looked to "to see what was the subject-matter which the parties had in their contemplation when the guarantee was given" (t). A guarantee in this form: "I, M., will be answerable for £50 sterling that Y., butcher, may buy of H.," was held to be a continuing guarantee to the extent of £50 when it appeared from the circumstances that the parties contemplated a continuing supply of stock to Y. in the way of his trade. The Court has power "not to alter the language, but to fill up the instrument where it is silent, and to apply it to the subject-matter to which the parties intended it to be applied" (u). In

(s) Bovill, C.J., *Coles v. Pack* (1869) (1869) L. R. 4 C. P. 595, 599.
L. R. 5 C. P. 65, 70.

(u) *Ib.*, and per Montague Smith, J.,

(t) Willes, J., *Hefield v. Meadows* at p. 601.

8a.
129, 130.

construing the language of the parties the whole of their expressions must be looked to, not merely the operative words. Thus the following words were held to show that a guarantee, which otherwise might have been confined to a single transaction, was intended to be continuing: "Having every confidence in him, he has but to call upon us for a cheque and have it with pleasure for any account he may have with you; and when to the contrary we will write you" (v).

B. became surety under bond to Government for the treasurer of a collectorate. The collector yearly examined the accounts and struck a balance which he certified to be correct. B. on each occasion executed a new bond, but the old bonds were not cancelled or given up. On subsequent inquiry, the treasurer was discovered to have embezzled moneys during each year. It was held that, on such discoveries being made, B. was still liable under the old bonds, there having been no novation (w).

130.—A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Revocation of
continuing
guarantee.

Illustrations.

(a) A., in consideration of B.'s discounting, at A.'s request, bills of exchange for C., guarantees to B., for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B. discounts bills for C. to the extent of 2,000 rupees. Afterwards, at the end of three months, A. revokes the guarantee. This revocation discharges A. from all liability to B. for any subsequent discount. But A. is liable to B. for the 2,000 rupees on default of C.

(b) A. guarantees to B. to the extent of 10,000 rupees, that C. shall pay all the bills that B. shall draw upon him. B. draws upon C. C. accepts the bills. A. gives notice of revocation. C. dishonours the bill at maturity. A. is liable upon his guarantee.

Future transactions.—The words "future transactions" must be taken to imply that the operation of this section is confined to cases where a series of distinct and separate transactions is contemplated.

(v) *Nottingham Hide Co. v. Bottrill of Bengal* (1872) 9 B. L. R. 364; 14 M. (1873) L. R. 8 C. P. 694. I. A. 86.

(w) *Lala Banshidhar v. Government*

It is otherwise in the case of an entire consideration. "Where a continuing relationship is constituted on the faith of a guarantee . . . the guarantee cannot be annulled during the continuance of that relationship"; and as the surety could not determine it himself by notice, so his death does not relieve his estate from liability; the nature of the transaction implies a contract to the contrary under s. 131. The father of a person admitted as an underwriting member of Lloyd's (a position from which he could not be removed except for certain causes specified in the rules of the association) gave a guarantee to Lloyd's "for all his engagements in that capacity"; it was held that the guarantee was not confined to transactions within the society, that it was not revocable while the son continued to be an underwriting member, and that the guarantor's death did not revoke it (x).

But a material change in what we may call the guaranteed situation may justify a revocation. Thus, in the common case of a continuing guarantee for a servant's honesty, proved dishonesty on the servant's part entitles the surety to say: "After this you must employ such a man, if you will, at your own peril" (y).

Illustration (a) was evidently founded on the case, fairly recent at the time, of *Offord v. Davies* (z). The truth is, as the judgment of the Court explains, that A.'s guarantee is in such circumstances nothing but an offer until B. has acted upon it by discounting a bill; for, if B. does not promise to discount C.'s bills, there is no immediate legal detriment to B. When B. does discount a bill, A.'s offer becomes a promise to that extent, and so from time to time. The standing offer is, therefore, revocable by A. at any time. "This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendant, or to the detriment of himself. But, until the condition has been at

(x) *Lloyd's v. Harper* (1880) 16 Ch. Div. 290 (Fry, J.) (see his statement of the principle at p. 306, quoted above), and C. A.

(y) *Phillips v. Fozall* (1872) L. R. 7 Q. B. 666, 677, 681, following on this point a dictum in *Burgess v. Eve* (1872) L. R. 13 Eq. 450, 458; but this is not the only ground for the decision. See s. 139, p. 596, below. The last-men-

tioned case, turning as it does partly on the peculiar rules as to instruments under seal, is not in itself of much value for Indian purposes.

(z) (1862) 12 C. B. N. S. 748; 133 R. R. 491; Finch, Sel. Ca. 87; and see the judgment of Baggallay, L. J., in *Morrell v. Cowan* (1877) 7 Ch. Div. 151, 154.

180. least in part fulfilled, the defendants have the power of revoking it. . . . We consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and, after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more." Accordingly we have here to do not with any peculiar feature in the relations of principal and surety, but with an application of the general common law doctrine of consideration.

Notice.—The mere denial of liability by the surety in a previous suit instituted by the creditor against him and the principal does not operate as a notice under this section (a).

Sureties for Guardians and Administrators.—It has been held by the High Court of Bombay (b) that this section does not apply to a surety bond required by the Court on the appointment of a guardian of the property of a minor. The surety in that case applied to the Court to be released from his obligation as such on account of the guardian's maladministration of the minor's estate, but the Court refused the application, stating that "the very object of requiring such security was to guarantee the minor against such misconduct or mismanagement on the part of the guardian." The Calcutta High Court, however, has held that this section applies to a surety bond passed under the Probate and Administration Act V of 1881, and that a surety for the administrator of an estate can as to future transactions, by giving notice, be released from his obligation as surety on account of maladministration of the estate by the administrator (c). As to the Bombay case it was said that, though it was similar in principle, the surety there had a remedy inasmuch as he might have applied to the Court as the next friend of the minor for the discharge of the guardian, while in the Calcutta case the surety was absolutely without a remedy, for, being neither a legatee nor a creditor, he could not take any steps to protect either the estate or himself by instituting administration proceedings. On the other hand it has been recently held by the Madras High Court, following the principle of the Bombay decision, that this section does not apply to surety bonds passed under

(a) *Bhikabhai v. Bai Bhuri* (1903) (1894) 19 Bom. 245.

27 Bom. 418.

(c) *Raj Narain v. Ful Kumari Devi*

(b) *Bai Somi v. Chokshi Ishwardas* (1901) 29 Cal. 68.

the Probate and Administration Act. "If the section applies, the 'creditor' would presumably be the obligee under the bond, i.e., the Judge or Registrar, and the surety could, without any action or any other legal proceeding, put an end to his liability by giving notice to the Judge or Registrar. This is contrary to established practice and might lead to great inconvenience" (d).

8a. 3
180, 181.

181.—The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Revocation
of continuing
guarantee by
surety's death.

"Contract to the contrary."—The English rule appears to be that where there is a guarantee subject to revocation by notice, and the surety dies without having revoked it, notice of his death to the creditor (or at all events of his death leaving a will) operates as a revocation (e). An express provision that a guarantor or his representatives may determine the guarantee by notice is an example of such a contract to the contrary as this section contemplates; in such a case mere notice of the death will not be enough (f).

It is by no means clear that the present section states the rule rather than an exception; at any rate, the "contract to the contrary" need not be in express terms.

Where A. guaranteed payment of rent to a lessor, and B. in turn promised A. to be responsible for all rent that might not be paid by the lessee, and which he might under his guarantee become liable to pay, it was held that, assuming that the latter transaction was a continuing guarantee, it was not revoked by B.'s death, and that B.'s

(d) *Subroya Chetty v. Ragammall* (1905) 28 Mad. 161, relying principally on *Re Stark* (1866) L. R. 1 P. & D. 76, to which it was observed the attention of the Calcutta Court was not drawn. In the Calcutta case the surety proceeded by an application in the probate proceedings, and in the Madras case a regular suit. The Madras Court said that the surety was not entitled to relief in either case.

(e) *Coulthart v. Clementson* (1879) 5

Q. B. D. 42, judgment on further consideration by Bowen, J. See, however, [1895] 1 Ch. at p. 577, and per Cotton, L.J., *Beckett v. Addyman* (1882) 9 Q. B. Div. 783, 792.

(f) *Re Silvester* [1895] 1 Ch. 573. For earlier and more or less conflicting authorities in courts of law and equity see *Bradbury v. Morgan* (1862) 1 H. & C. 249; *Harriss v. Fawcett* (1873) L. R. 8 Ch. 866.

85. representative was liable to A. for rent paid by A. to the lessor after
181, 182. B.'s death on failure of the lessee to pay the same (g).

Compare s. 208, p. 697 below, as to the determination of an agent's authority.

132.—Where two persons contract with a third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract, the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on another's default.

Illustration.

A. and B. make a joint and several promissory note to C. A. makes it in fact as surety for B., and C. knows this at the time when the note is made. The fact that A., to the knowledge of C., made the note as surety for B. is no answer to a suit by C. against A. upon the note.

Joint debtors and suretyship.—This rule is elementary so far as it goes ; but it is material to observe that it does not extend beyond its literal terms. Where one of two joint debtors is, to the knowledge of the creditor, in fact a surety for the other as between themselves, his immediate liability to the creditor is not qualified, but he is entitled to the rights of a surety under the following sections : 133, 134, 135. " When two or more persons bound as full debtors arrange, either at the time when the debt was contracted or subsequently, that *inter se*, one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley v. Pasheller* (h) and *Overend, Gurney & Co. v. Oriental Financial Corporation* " (i).

(g) *Gopal Singh v. Bhawani Prasad* (1888) 10 All. 531. *ing Co.* [1894] A. C. 586, 598. In *Swire v. Redman* (1876) 1 Q. B. D. 536, *Oakeley*

(h) (1836) 4 Cl. & F. 207 ; 42 R. R. 1.

(i) (1874) L. R. 7 H. L. 348 ; per Lord Watson, *Bowse v. Bradford Bank-* See per Lord Herschell, [1894] A. C. at p. 591.

There need not be any assent by the creditor, much less a new agreement to accept the secondary debtor in the relation of surety (*j*). 86, 132, 133.

It is equally settled in Indian Courts that in a case within this section if the creditor, with knowledge of the contract between the co-debtors, does any of the acts specified in ss. 133, 134, or 135, the legal consequence of which is the discharge of the surety, the debtor, who is in fact a surety, will thereby be discharged from liability (*k*).

The provisions of this section do not apply where the liability undertaken is not the same. A party who accepts bills of exchange for the accommodation of another is not precluded by this section from pleading that he was an accommodation acceptor only. The liability undertaken by the acceptor and drawer of a bill is in no sense a joint liability, and though they each contract to pay the same sum of money, they contract severally in different ways, and subject to different conditions (*l*).

133.—Any variance, made without the surety's consent, in the terms of the contract between the principal and the creditor, discharges the surety as to transactions subsequent to the variance.

Discharge of
surety by variance
in terms of contract.

Illustrations.

(a) A. becomes surety to C. for B.'s conduct as a manager in C.'s bank. Afterwards, B. and C. contract, without A.'s consent, that B.'s salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B. allows a customer to overdraw, and the bank loses a sum of money. A. is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss. [*Bonar v. Macdonald* (1850) 3 H. L. C. 226; 88 R. R. 60.]

(b) A. guarantees C. against the misconduct of B. in an office to which B. is appointed by C. and of which the duties are defined by an Act of the Legislature. By a subsequent Act the nature of the office is materially altered. Afterwards B. misconducts himself. A. is discharged by the change from future liability under his guarantee, though the misconduct of B. is in respect of a duty not affected by the later Act. [*Oswald v. Mayor of Berwick*

(*j*) *Wythes v. Labouchere* (1858) 3 De G. & J. 593, 599; 121 R. R. 238, 242. (*l*) *Pogose v. Bank of Bengal* (1877) 3 Cal. 174, 184. *Cp. Overend, Gurney*
(*k*) See *Punchannun Ghose v. Daly & Co. v. Oriental Financial Corporation*, (1875) 15 B. L. R. 331; *Haryiban Das v. Bhagwan Das* (1871) 7 B. L. R. 535.

S. 133.

(1856) 5 H. L. C. 856 (the rule of law was undisputed, and the only question considered was whether there had been a material alteration in the office); *Pybus v. Gibb* (1856) 6 E. & B. 902, 911, also treating the rule as settled.]

(c) C. agrees to appoint B. as his clerk to sell goods at a yearly salary, upon A.'s becoming surety to C. for B.'s duly accounting for moneys received by him as such clerk. Afterwards, without A.'s knowledge or consent, C. and B. agree that B. should be paid by a commission on the goods sold by him, and not by a fixed salary. A. is not liable for subsequent misconduct of B.

(d) A. gives to C. a continuing guarantee to the extent of 3,000 rupees for any oil supplied by C. to B. on credit. Afterwards B. becomes embarrassed, and, without the knowledge of A., B. and C. contract that C. shall continue to supply B. with oil for ready money, and that the payment shall be applied to the then existing debts between B. and C. A. is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C. contracts to lend B. 5,000 rupees on the 1st March. A. guarantees repayment. C. pays the 5,000 rupees to B. on the 1st January. A. is discharged from his liability, as the contract has been varied, inasmuch as C. might sue B. for the money before the 1st of March. [*Bonser v. Cox* (1841-4) 4 Beav. 379, 6 Beav. 110; 55 R. R. 113.]

Variation of contract between creditor and principal.—This is a rule of long standing, thus expressed by Lord Cottenham: "Any variance in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, even though the original agreement may, notwithstanding such variance, be substantially performed, will discharge the surety." (m).

Again, it was laid down a generation later by the Judicial Committee: "A long series of cases has decided that a surety is discharged by the creditor dealing with the principal or with a co-surety in a manner at variance with the contract the performance of which the surety has guaranteed" (n). Moreover, as the case now cited shows, the more special provisions of the two following sections are deductions from the same principle.

"The party who is surety for another for the performance of an engagement can only be called upon to guarantee the performance of

(m) 3 H. L. C. at pp. 238, 239. The law is the same in Scotland: *ib.*

(n) *Ward v. National Bank of New Zealand* (1883) 8 App. Ca. 755, 763.

that engagement when the engagement is carried into complete, literal, and strict effect. . . . He enters into a particular and specific contract, and that contract alone he is bound to perform." (o).

The only qualification (for it is not an exception) to the generality of the rule is that, where a guarantee is for the performance of several and distinct contracts or duties, a change in one of those contracts or duties will not affect the surety's liability as to the rest (p).

A somewhat peculiar case is the following:—N. owed £3,400 to P., and was about to dispose of his business to a company to be formed. It was agreed between N. and P. that N. should pay off the debt within a time named, and in the meantime transfer to P. shares in the company of the nominal value of £6,000, and redeem them at par within twelve months; and (among other terms) N.'s book debts should be collected by one V. and divided equally between P. and a certain other creditor, P.'s share to be applied towards redemption of the shares above mentioned. E. guaranteed the redemption of the shares. Some months later P. released his interest in the book debts to N. Later N. failed to deliver the shares, as promised. This was a variance from the original contract which discharged E., the surety. "The surety at the time he entered into the suretyship had a right to have these book debts appropriated to reduce the principal debt, and that right he has been deprived of by the act of the creditor in releasing the book debts." "The surety is entitled to remain in the position in which he was at the time when the contract was entered into" (q).

Attempts have been made to confine the rule to the cases where the variance materially affects the surety's interest, and to treat it as a question in each case whether the change is material for this

(o) Lord Lyndhurst, L.C., *Bonser v. Cox* (1844) 13 L. J. Ch. 260; 55 R. R. 120.

(p) *Skillett v. Fletcher* (1866-7) L. R. 1 C. P. 217; 2 C. P. 469; *Croydon Gas Co. v. Dickinson* (1876) 2 C. P. Div. 46.

(q) *Polak v. Everett* (1876) 1 Q. B. Div. 669, per Blackburn, J., at p. 774

(where the words "to the person collecting them" seem to be a slip), per Mellor, J., at p. 677. Lord Blackburn disliked the rule and doubted its wisdom (p. 674), but admitted that it was beyond discussion. The C. A. affirmed the decision of the Q. B. D. for the same reasons without delivering any formal judgment (p. 678).

U. 133. purpose. Only one reported case appears to countenance this view (r), and it is clearly inconsistent with later and higher authority. There may be "cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety," and in such cases "the surety may not be discharged," but "if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged" (s).

Accordingly we can see no ground for the suggestion that the present section goes beyond English law.

Where by the terms of a consent decree for the payment by instalments of a sum of money with interest passed against certain defendants as principal debtors, and against other defendants, as sureties, it was stipulated that on default of payment of any one instalment the decree-holder should sell the properties of the principal debtors for the whole amount remaining due under the decree, and the liability of the sureties was limited to the deficiency, it was held by the Judicial Committee that the omission of the decree-holder to sell the properties until after several years after the first order for sale for the purpose of increasing the interest payable to him under the decree discharged the sureties to the extent of the interest that had accrued due after the date of that order (t). The judgment proceeded on the ground that the conduct of the decree-holder in delaying the sale has the result of "laying an additional burden upon the sureties."

A. becomes surety to C. for payment of rent by B. under a lease. Afterwards B. and C. contract, without A.'s consent, that B. will pay

(r) *Sanderson v. Aston* (1873) L. R. L.J.J., followed *Bolton v. Salmon* [1891] 8 Ex. 73, judgment on second plea. 2 Ch. 48, 54.

(s) *Holme v. Brunskill* (1878) 3 Q.B. (t) *Ramanund v. Chowdhry Soonder* Div. 495, 505, per Cotton and Thesiger, *Narain* (1878) 4 Cal. 331.

rent at a higher rate. A. is discharged from his suretyship in respect of arrears of rent accruing subsequent to such variance (u). S. 183.

A. owes Rs. 1,300 to B. C. afterwards requests B. to forbear to sue A. for a week, and deposits Rs. 1,300 with B. as a security. B. agrees to forbear as requested. A. fails to pay within a week. B. afterwards obtains from A., a promissory note payable on demand for Rs. 1,800. C. is discharged from the suretyship, and is entitled to recover back his deposit from B. (v).

A., an agriculturist within the meaning of the Dekhan Agriculturists' Relief Act XVII of 1879, guaranteed to C. the payment by B., a non-agriculturist, of the amount of a bond payable by B. on demand. Under the Limitation Act XV. of 1877, Shed. II. art. 59, the period of limitation on such a bond is three years from the date of the bond. By a subsequent Act (the Dekhan Agriculturists' Relief Act of 1879, s. 72) the period of limitation for the recovery of money against an agriculturist, whether a principal or surety (w), was extended to six years. C. sued A. and B. for the bond after three years, but within six years, from the date of the bond. A. pleaded variance in the contract introduced by the Legislature, and contended that he was discharged from his suretyship, as the effect of the latter act was to extend the period of his liability for a further term of three years. It was held that though the suit against B., the principal debtor, was barred under the Limitation Act, A. remained liable as surety under the Agriculturists' Relief Act, and that he was not discharged under the provisions of the present section, as the variance was not made by the principal debtor and surety, but by the Legislature (x). The case is distinguishable from Illustration (v) in that the subsequent legislation did not introduce any alteration in the terms of the contract.

(u) *Khatun Bibi v. Abdullah* (1880) 495.

3 All. 9. Where the thing guaranteed (v) *Creet v. Seth and Seth* (1887) All. W. N. 136.

is not the payment of rent, but something collateral to be due by the tenant, (w) The section has since been amended so as to exempt sureties, evidently in pursuance of a suggestion from the Bench in the case cited in the following foot note.

it actually diminishes the rent payable: (x) *Hajarimal v. Krishnarav* (1881) 5 Holme v. Brunskill (1877) 3 Q. B. Div. Bom. 647.

5. 183.

But an attempted variance which is inoperative, as being against the local law applicable as between the creditor and the principal debtor, will not discharge the surety. A Canadian banker's loan and interest were guaranteed; the bank increased the rate of interest from 7 to 8 per cent., 7 per cent. being the highest the bank could legally charge in Canada; the guarantors remained bound for principal and lawful interest (y).

In a modern case on appeal from the Supreme Court of New Zealand the judgment of the Judicial Committee (z) summed up the doctrine in connection with its principal applications. It is thought useful to quote this statement as a whole, although it involves the repetition of one or two references already given:

"In pursuance of this principle, it has been held that a surety is discharged by giving time to the principal, even though the surety may not be injured, and may even be benefited thereby. The reason of this rule is thus given by Lord Eldon in the case of *Samuell v. Howarth* (a): 'The surety is discharged for this reason, because the creditor in so giving time to the surety has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not.... It has been truly stated that the renewal of bills might have been for the benefit of the surety, but the law has said that the surety shall be the judge of that.... The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.'

"A recent decision of the Court of Appeal, in *Holme v. Brunskill* (b), is based on the same principle. The defendant gave the plaintiff a bond that the tenant of his farm should on the expiration of his tenancy redeliver a flock of sheep on the farm in good order and condition. By an agreement between the plaintiff and the tenant the tenant gave up a field on the farm, and held the remainder at a reduced rental. The jury, at the trial, having found that the surety was not prejudiced by this agreement, it was held by Lord Justices Cotton and Thesiger (Lord Justice Brett dissenting) that, notwithstanding the finding of the jury, the surety was released.

"Lord Justice Cotton observes: 'The true rule, in my opinion, is that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, and one which cannot be prejudicial to the surety, the surety may not be discharged, yet that if it is

(y) *Eghert v. National Crown Bank* wards Lord Monkswell.
 [1918] A. C. 903. (a) (1817) 3 Mer. 272; 17 R. R. 81.
 (z) Delivered by Sir R. Collier, after- (b) 3. Q. B. D. 495.

not self-evident that the alteration is unsubstantial, or one that cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry into the effect of the alteration.' The *ratio decidendi* is thus stated: 'The plaintiff attempts to substitute for the contract that the flock shall be given up in good condition with the farm as then demised a contract that it should be delivered up in like condition with a farm of different extent. . . . The surety ought to have been asked to decide whether he would assent to the variation. He never did assent, and in my opinion was discharged from liability.' To the same effect is *Polak v. Everett* (c), where, there being a stipulation that half the book debts of the debtor should, under certain circumstances, be made over to the creditor, he released the book debts, and accepted in lieu thereof a supposed equivalent. The ground of the decision is thus stated by Quain, J.: 'The contract of the surety—should not be altered without his consent, and the creditor should not undertake to alter the contract and then say, "Although the contract has been altered, and I have put it out of my power to carry it out by a voluntary act, I now offer you an equivalent." ' (d).

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134.—The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Discharge of surety by release or discharge of principal debtor.

Illustrations.

(a) A. gives a guarantee to C. for goods to be supplied by C. to B. C. supplies goods to B., and afterwards B. becomes embarrassed, and contracts with his creditors (including C.) to assign to them his property in consideration of their releasing him from their demands. Here B. is released from his debt by the contract with C., and A. is discharged from his suretyship.

(b) A. contracts with B. to grow a crop of indigo on A.'s land, and to deliver it to B. at a fixed rate, and C. guarantees A.'s performance of this contract. B. diverts a stream of water which is necessary for irrigation of A.'s land, and thereby prevents him from raising the indigo. C. is no longer liable on his guarantee.

(c) A. contracts with B. for a fixed price to build a house for B. within a stipulated time, B. supplying the necessary timber. C. guarantees A.'s performance of the contract. B. omits to supply the timber. C. is discharged from his suretyship.

(c) 1 Q. B. D. 609.

Zealand (1883) 8 App. Ca. 755, 763.

(d) *Ward v. National Bank of New*

§. 184. Creditor's discharge of principal debtor.—“ The law upon this subject is clear and well settled. If the creditor, without the consent of the surety, by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged ” (e).

But it is to be observed, with regard both to this and to the following section, that if the creditor expressly reserves his remedies against the surety, or generally his securities and remedies against persons other than the principal debtor, the surety is not discharged. In England this is as well settled as the main rule ; and it is really quite consistent with the terms of the present section. For the reason of the doctrine is that a nominal release of the debtor, subject to a reservation of securities, is not a release destroying the debt, but operates only as a covenant not to sue the principal debtor, who remains, however, liable to indemnify the surety (f). The surety's right to indemnity against the principal debtor is a necessary result of such a reservation (g). Like effects may be produced without an express reservation. “ Where the whole debt has not been discharged, but the debt as to part remains undischarged, but the principal debtor cannot be pursued by the creditor for the balance, the surety may by apt words be left liable although the principal debtor has as regards such balance been released as between himself and the creditor.” In the case referred to the surety had executed mortgages to a bank to secure the overdraft of a firm composed of his own two sons, and each deed contained a declaration that the bank might “ without affecting their rights herein ” compound or make arrangements with the debtors. Under a scheme of arrangement made by the debtors with their creditors, including the bank, the Court of Appeal held that the mortgage security was released only for a certain portion of the debt as to which there was an express and complete substitution of a new security (h).

(e) Kelly, C.B., in *Cragoe v. Jones* J. 438, 442.

(1873) L. R. 8 Ex. 81, 82.

(g) *Close v. Close* (1853) 4 D. M. G.

(f) *Bateson v. Gosling* (1871) L. R. 176, 185.

7 C. P. 9, where former authorities are

critically reviewed by Willes, J., *Green*

v. Wynn (1869) L. R. 4 Ch. 204 ; fol-

lowing *Webb v. Hewitt* (1857) 3 K. &

(h) *Perry v. Nat. Prov. Bank of Eng-*

land [1910] 1 Ch. 464, per Buckley, L.J.,

at p. 478, distinguishing the *Commercial*

Bank of Tasmania's case (next note).

But where there is a final and full release of the principal debtor by a complete novation or otherwise, "the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone." Acceptance of a new debtor instead of the old one puts an end to the liability of a surety for the old debt (i).

The importance of the English doctrine as to reservation of rights is, however, considerably diminished by the operation of s. 138 (p. 595, below).

Discharge by operation of law.—A discharge of the principal debt, or in bankruptcy does not operate as a discharge of the sureties (j).

"Act or omission of the creditor."—The acts or omissions contemplated by this section may be those referred to in ss. 39, 53, 54, 55, 63, 67, 118, and 120 (*ante*). The facts of Illustration (c) to this section are similar to those of Illustration (b) to s. 54 (p. 316, above). If the principal debtor is discharged from his obligation by reason of any acts or omissions specified in those sections, the liability of the surety will determine. But the act or omission must be one of which the legal consequence is the discharge of the principal debtor. The mere omission therefore, of a creditor, in a suit by him against a principal debtor and a surety, to effect service of summons on the principal debtor does not discharge the surety, for the principal debtor is not thereby discharged from liability to the creditor. The only consequence of such an omission is to enable the Court to dismiss the suit as against the principal debtor after the expiration of one year under s. 99A of the Code of Civil Procedure, 1882 [new Code of 1908, O. 9 r 5]; but the plaintiff would still be at liberty to bring a fresh suit against the principal debtor under the provisions of that section (k).

Creditor's omission to sue principal within limitation period.—The question whether a surety is discharged when a creditor allows his remedy against the principal debtor to become barred by limitation may be considered at this stage. On this point there

(i) *Commercial Bank of Tasmania v. Jones* [1893] A. C. 313, 316.

(k) *Shaik Ali v. Mahomed* (1889) 14 Bom. 267; *Nathabhai v. Ranchodlal*

(j) *Morice v. Simla Bank Corporation, Ltd.* (1878) *Punj. Rec.* no 2.

(1915) 30 Bom. 52.

s. 134. are two opposite views taken by the Indian High Court. On the one hand, it has been held by the High Court of Bombay (l), Calcutta (m) and Madras (n) that the surety is not under such circumstances discharged from liability to the creditor; the High Court of Allahabad (o), on the other hand, has held that the surety is discharged. The conflict arises in great part from the provisions of s.137 (p. 594, below), and especially the words "mere forbearance" occurring in that section. It is conceded by the Bombay and Calcutta High Courts, that, if s. 134 stood alone, the omission of a creditor to sue the principal debtor within the period of limitation would discharge the surety under that section, as having the legal consequence of discharging the principal debtor; but the Madras High Court relies on the well-known distinction between the barring of the remedy by action (which is consistent with the debtor not being discharged for other purposes) and the complete extinction of a debt. It is also thought in England that omission of the creditor to sue within the period of limitation does not discharge a surety for another and more substantial reason, that "the surety can himself set the law in operation against the debtor" (p). It seems that the opinion of the majority of the High Courts, fortified by a judicial dictum of great weight in the English Court of Appeal, must be accepted as correct.

In the case of parties to a negotiable instrument their rights and liabilities are governed by the Negotiable Instruments Act. Accordingly the omission on the part of an indorsee of a hundi to sue the acceptor within the period of limitation does not discharge the drawer where the suit has been instituted as against him in time (q).

In view of the great preponderance of authority on the principle, it does not now appear useful to examine the facts of the Indian cases to see how far any of them may be distinguishable.

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- (l) *Hajarimal v. Krishnarav* (1881) 5 Bom. 647; *Ranjit Singh v. Naubat* (1902) 24 All. 504. See also *Hazari v. Chunnai Lal* (1883) 7 Bom. 146. (1886) 8 All. 259.
- (m) *Krishito Kishori Chowdhraim v. Radha Romun* (1885) 12 Cal. 330. (p) Per Lindley, L.J., *Carter v. White* (1883) 25 Ch. Div. 666, 672. There seems to be no direct decision.
- (n) *Subramania v. Gopala* (1909) 33 Mad. 308. (g) *Jambu Ramaswamy v. Sundararaja* (1902) 26 Mad. 239.
- (o) *Radha v. Kinlock* (1889) 11 All.

Guarantee under an agreement to give time to judgment debtor.—S. 257A of the Code of Civil Procedure, 1882 (not re-enacted in the Code of 1908, in force since January 1, 1909), provided *inter alia* that every agreement to give time for the satisfaction of a judgment debt and every agreement for the satisfaction of a judgment debt which provided for the payment, directly or indirectly, of any sum in excess of the sum due or to accrue due under the decree should be void unless it was made with the sanction of the Court, and unless in the case of an agreement to give time it was made for consideration which the Court deemed reasonable under the circumstances of the case. Where such an agreement was entered into between a decree-holder and a judgment debtor without the sanction of the Court, and a guarantee was given for the performance of the agreement, the question might arise whether, the original agreement being void for want of sanction, the surety was discharged under the provisions of this section. This point, which was raised in *Ranjit Singh v. Naubat* (r) but was not decided, is now of no importance. The case where an agreement is void because of the disability of one of the parties thereto to enter into it stands upon a different footing, for the surety in that case would be held liable as a principal (s).

See
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135.—A contract between the creditor and the principal

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor.

debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Contract to give time to principal debtor.—The leading English cases have already been cited under the preceding section. The earliest decision, one commonly referred to in modern books, dates from 1795 (t). The general principle was thus stated: "It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in any transaction with the principal debtor. You cannot keep him

(r) (1902) 24 All. 504, 506.

there.

(s) See *Kashiba v. Shripat* (1894) 19 Bom. 697, and the English cases cited 3 R. R. 3 (Lord Loughborough).

(t) *Rees v. Berrington*, 2 Ves. Jr. 540,

135. bound and transact his affairs (for they are as much his as your own) without consulting him."

A nominal giving of time may have the effect, in substance, of accelerating the creditor's remedy, as where, having commenced an action against the principal debtor, the creditor took a recorded acknowledgment of the debt and undertook not to enforce it before a certain day, which, however, was earlier than the time at which he could have obtained judgment in the action in the ordinary course. In such a case the surety, being manifestly not prejudiced, is not discharged (*u*).

A contract whereby the creditor promises to give time to the principal debtor must be distinguished from an unconditional contract not to sue him. In the former case, the remedy of the creditor is merely suspended until the determination of the fixed period; in the latter case, the principal debtor is completely released from his obligation so as to entitle the surety to a discharge under s. 134, apart from the specific provisions of this section. In either case, the mere formation of the contract is sufficient to operate as a discharge of the surety irrespective of any forbearance that may be exercised under it. The reason of this rule appears to be that a surety has a right, immediately on the debt becoming due, to insist upon proceedings being at once taken by the creditor against the principal debtor, and any contract that would prevent the creditor from suing him would be inconsistent with that right (s. 139) (*v*). But the contract must be a binding one supported by consideration; forbearance to sue, therefore, exercised in pursuance of an agreement without consideration, would not discharge the surety, as it does not amount to anything more than "mere forbearance" within the meaning of s. 137 (*w*). It is not necessary that the contract should be express: a tacit or implied contract inferred from the acts of the parties is equally binding as an express one. Thus the acceptance of interest in advance by a creditor

(*u*) *Hulme v. Coles* (1827) 2 Sim. 12; 29 R. R. 52. Similarly the surety is not discharged by the creditor's innocent acceptance from the principal debtor of a payment which is in fact a fraudulent preference: *Petty v. Cooke* (1871) L. R. 6 Q. B. 790.

(*v*) See *Protab Chunder v. Gour Chunder* (1878) 4 Cal. 132, 134.

(*w*) *Damodar Das v. Muhammad Husain* (1900) 22 All. 351; *Maharaj Bahadur Sing v. Basanta Kumar* (1913) 17 Cal. W. N. 695, 697—698.

operates as a general rule as an agreement to give time to the principal debtor and consequently as a discharge to the surety ; for the creditor is in that event precluded from suing the principal until the time covered by the payment in advance has expired (r). But the surety will not be discharged if he consents to the contract. Such consent may be a general one, and it has been held by the Judicial Committee that a stipulation between a creditor, principal debtor, and a surety that the surety should not be released by any dealings between the creditor and the principal debtor, followed by a contract to give time to the principal debtor, does not discharge the surety (y).

Contrary agreement.—The operation of the rule as to giving time to the principal debtor may be excluded by express agreement. If the instrument creating the debt and the suretyship declares that the surety or sureties shall be taken, as between themselves and the creditor, to be principal debtors, and shall not be released by reason of time being given, or of any other forbearance, act, or omission of the creditor which, but for this provision, would discharge the sureties, then any defence on these grounds is effectually barred, and it is unnecessary to consider whether the facts would otherwise raise it (z).

(r) Surety not discharged when agreement made with third person to give time to principal debtor.

136.—Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Illustration.

C., the holder of an overdue bill of exchange drawn by A. as surety for B., and accepted by B., contracts with M. to give time to B. A. is not discharged.

“ It is clear that when the creditor enters into a binding contract with the principal debtor to give him time without the assent of the sureties, and without reserving his remedy against the sureties, each

(r) *Kali Prasanna v. Ambica Charan* (1872) 9 B. L. R. 261 ; *Protap Chunder v. Gour Chunder*, *supra* ; *Gourchandra v. Protapchandra* (1880) 6 Cal. 241, where it was found that the surety consented to advance interest being taken. See also *Punchann Ghose v. Daly* (1875) 15 B. L. R. 331, and the observations of Pehear, J., at p. 338.
(y) *Hodges v. Delhi and London Bank, Ltd.* (1900) 23 All. 137, 147 L.R. 27 Ind. Ap. 168.
(z) *Greenwood v. Francis* [1899] 1 Q. B. 312, C. A.

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giving of time discharges the sureties.....But, to produce this result, two things are necessary. There must be a binding contract to give time, capable of being enforced ; and the contract must be with the principal debtor. If merely made with a third party it will not do, as was decided in *Frazer v. Jordan* (a), where in an action by the holder against the drawer of a bill of exchange it was held to be no defence to the drawer that the holder had, without the drawer's consent, made a binding contract with a third party to give time to the acceptor, in consideration of an undertaking by the third party to see the bill paid." (b).

137.—Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Creditor's forbearance to sue does not discharge surety.

Illustration.

B. owes to C. a debt guaranteed by A. The debt becomes payable. C. does not sue B. for a year after the debt has become payable. A. is not discharged from his suretyship.

"Mere forbearance."—"If you agree with the principal to give him time, it is contrary to that agreement that you should sue the surety, because if you sue the surety you immediately turn him upon the principal, and therefore your act breaks the agreement into which you have entered with the principal." But this applies only where there is a binding agreement. "It is not simply neglecting to sue the principal which would have any effect upon the surety, but there must be a positive agreement with the principal that the creditor will postpone the suing of him to a subsequent period" (c).

S. 135 deals with the case in which a surety is discharged by a contract between the creditor and the principal debtor, entered into without the surety's consent, to give time to, or not to sue, the principal debtor. This section deals with the case of "mere forbearance"

(a) 8 E. & B. 303 ; 112 R. R. 572.

(b) *Clarke v. Bisley* (1889) 41 Ch. D. 422, 434, per North, J.

(c) *Oriental Financial Corporation v. Overend, Gurney & Co.* (1871) L. R. 7 Ch. 142, 150 (Lord Hatherley).

to sue, as distinguished from forbearance springing from a contract (d) and provides that the surety shall not be discharged in such a case. Now the forbearance to sue, which does not arise from a contractual obligation, may be exercised for a period short of the period of limitation prescribed for the suit, or it may continue until the expiration of the limitation period. The illustration to the section affords an instance of the former case, the limitation period for the suit being three years, and the forbearance exercised only for a year. The surety is not discharged in such a case, and it is equally clear that he would not be discharged even if the forbearance continued for a longer period, provided it fell short of the period of limitation. It seems moreover, according to the weight of decision and English opinion, that it makes no difference if the forbearance continues until the period of limitation has elapsed (see on s. 134, pp. 587, 588, above).

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138.—Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties.

Release of one
co-surety does not
discharge others.

Release of one of several sureties.—This section is a necessary consequence of the principle laid down in s. 44, and must be taken as a deliberate extension of a rule which in the common law is limited to the case of co-sureties contracting severally and not jointly. Only where co-sureties have contracted jointly—that is, where the joint suretyship of the others was part of the consideration for the contract of each—does a release of one of them by the creditor discharge the others (e). “The release of a surety discharges a joint co-surety, but not a co-surety severally bound” (f).

The present section appears to abolish this distinction.

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| <p>(d) <i>Hajarimal v. Krishnarav</i> (1881) 5 Bom. 647, 651, <i>Damodar Das v. Muhammad Husain</i> (1900) 22 All. 351 (where it was held that the agreement to give time being without consideration, the case was not one of contract to give time to the principal debtor, but of “mere forbearance” within the meaning of the section); <i>Kanai Prasad v.</i></p> | <p><i>Jotindra Kumar</i> (1909) 36 Cal. 626. (e) <i>Ward v. National Bank of New Zealand</i> (1883) 8 App. Ca. 755, 764, 765. There is some apparent conflict in earlier English authorities; it would be useless to discuss this here. (f) <i>Leake</i>, 678. <i>Cp. Ex parte Good</i> (1877) 5 Ch. Div. 46.</p> |
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139.—If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (g).

Discharge of surety by creditor's act or omission impairing surety's eventual remedy.

Illustrations.

(a) B. contracts to build a ship for C. for a given sum, to be paid by instalments as the work reaches certain stages. A. becomes surety to C. for B.'s due performance of the contract. C., without the knowledge of A. propays to B. the last two instalments. A. is discharged by this prepayment. [*Calvert v. London Dock Co.* (1837) 2 Keen, 638; 44 R. R. 300, with immaterial variation of facts.]

(b) C. lends money to B. on the security of a joint and several promissory note made in C.'s favour by B., and by A., as surety for B., together with a bill of sale of B.'s furniture, which gives power to C. to sell the furniture, and apply the proceeds in discharge of the note. Subsequently C. sells the furniture, but, owing to his misconduct and wilful negligence, only a small price is realised. A. is discharged from liability on the note. [Perhaps suggested by *Watson v. Allcock* (1853) 4 D. M. G. 242, where the creditor by negligence lost the benefit of an additional remedy against the principal debtor.]

(c) A. puts M. as apprentice to B., and gives a guarantee to B. for M.'s fidelity. B. promises on his part that he will, at least once a month, see M. make up the cash. B. omits to see this done, as promised, and M. embezzles. A. is not liable to B. on his guarantee.

Act or omission of creditor tending to impair surety's remedy.—The language of this section appears to be derived from a statement of the law in Story's Equity Jurisprudence, s. 325, adopted by the Court of Exchequer in 1860 (h).

Observe that the injurious quality to be considered is tendency to diminish the surety's remedy or increase his liability. Transactions having an immediate tendency to cause or permit the principal debtor to make default are only one species of those to which the surety

(g) *Cp.* s. 133, p. 583 above. A certain number of cases may equally well be considered as falling within either section.

(h) *Watts v. Shuttleworth*, 5 H. & N. 235; 7 H. & N. 363; 120 R. R. 559; 126 R. R. 471.

may object. "In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him, it has been contended that what was done was beneficial to the surety, and the answer has always been, that the surety himself was the proper judge of that, and that no arrangement different from that contained in his contract is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is whether what has been done lessens that security" (i).

But mere passive acquiescence by the creditor in irregularities on the part of the principal debtor such as laxity in the time and manner of rendering accounts by a collector of public moneys whose fidelity is guaranteed, will not of itself discharge the surety (j).

Neither is the surety discharged from liability for the principal debtor's default in a manner within the terms of the guarantee because that default would not have happened if the creditor had exercised all the powers of superintending the performance of the debtor's duty which he could have exercised consistently with the contract.

The employer of a servant whose due performance of work is guaranteed does not contract with the surety that he will use the utmost diligence in checking the servant's work (k). "A surety cannot claim to be discharged on the ground that his position has been altered by the conduct of the person with whom he has contracted where that conduct has been caused by a fraudulent act or omission against which the surety by the contract of suretyship has guaranteed the employer" (l).

But if the employer of a servant whose fidelity has been guaranteed continues to employ him after a proved act of dishonesty, the surety is discharged (m).

(i) *Lord Langdale, Calvert v. London Dock Co.*, 2 Keen, at p. 644, 44 R. R. at p. 304.

(j) *Mayor of Durham v. Fowler* (1889) 22 Q. B. D. 394.

(k) *Mayor of Kingston-upon-Hull v. Harding* [1892] 2 Q. B. 494, C. A. (Subject of guarantee was due perform-

ance of contract for public works. The work was scamped, and the defects fraudulently concealed from the town council's engineer and his deputy).

(l) *Bowon, L.J.* [1892] 2 Q. B. at p. 504.

(m) *Phillips v. Fozall, L. R. 7 Q.B.* 666, p. 577 above.

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39, 140.

Act or omission impairing surety's eventual remedy.—The case in which a party is discharged by an act or omission of the creditor, of which the legal consequence is the discharge of the principal debtor, has been dealt with in s. 134, p. 587 above. Under the present section a surety will be discharged by acts or (subject to the caution above given) omissions of the creditor specified therein which, though not having the legal consequence of discharging the principal, impair the eventual remedy of the surety against him (n).

Where the liability of a surety guaranteeing payment by a judgment debtor of the amount of a decree by instalments was expressly made dependent on the execution of the decree by the decree-holder on the occurrence of a single default, it was held that the omission to execute the decree on the happening of the default until execution had become time-barred discharged the surety under the provisions of this section (o). The decision was based on the ground that the decree-holder owed a duty to the surety under the terms of the guarantee, and that the failure to perform that duty until the decree became defunct by lapse of time must necessarily have impaired the "eventual remedy" of the surety against the judgment debtor.

As to negotiable instruments, it is specially provided by Act XXVI of 1881, s. 39, that "where the holder of a negotiable instrument without the consent of the indorser, destroys or impairs the indorser's remedy against a prior party, the indorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity."

140.—Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor (p).

Rights of surety
on payment or
performance.

(n) See *Pogose v. The Bank of Bengal* (1877) 3 Cal. 174, where it was held that a deed of trust for the benefit of creditors did not impair the "eventual remedy" of the surety against the principal debtor; *Ghuznavi v. National Bank of India* (1916) 20 Cal. W. N. 562.

(o) *Hazari v. Chunni Lal* (1886) 8 All. 259. The case resembles, on this point, *Watson v. Allcock*, noted on Illustration (b), p. 596 above.

(p) For example, the right to stop in transit, and, in an appropriate case, seller's lien. Where, by the custom of

This section lays down a general principle of which the most important practical application is to be found in s.141. It seems that the intention of the Act is to keep alive for the surety's benefit any right of the creditor, under a security or otherwise, which would otherwise have been extinguished at law by the payment of the debt or performance of the duty. Such an intention, at any rate, is more elaborately expressed by the English Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97, s. 5), with which the framers of the present Act were undoubtedly acquainted. English Courts of Equity had seen their way to put the surety in the creditor's place for the purpose of using all existing securities and remedies, but not to revive or save for the surety's benefits securities which, on payment of the debt, ceased to exist by operation of law (q). The practical importance of this exception or limitation, while it lasted, was bound up with technical rules as to the preference of "specialty" over simple contract debts which have now largely ceased to be operative in England, and were never introduced in British India.

Early in the nineteenth century the rule was expounded in an argument of Sir Samuel Romilly's which, like another and better known one of the same learned counsel (r), has attained the very rare honour of being made authoritative by the approval of the Court: "The whole doctrine of principal and surety, with all its consequences of contribution, etc. (s), rests upon the established principles of a Court of Equity, not upon contract, except as it may be so represented upon the implied knowledge of those principles. There is no express contract for contribution, the bonds generally if not universally, being joint and several, creating several obligations by each. . . . [The general reason of the equitable doctrines is] that a surety is to be entitled to every remedy which the creditor has

trade, a broker who buys for an undisclosed principal is liable to the seller of the goods for the buyer's default, and has himself paid the seller, he is entitled to the seller's lien as against the buyer: *Imperial Bank v. London and St. Katherine Docks Co.* (1877) 5 Ch. D. 195.

(q) See 2 Wh. & T. L. C. 7th ed. at p. 561; but the point is now only of historical interest even in England.

(r) In *Huguenin v. Baseley*. See notes on s. 16, p. 98 above.

(s) See ss. 146, 147, pp. 611: 613 below.

§ 140. against the principal debtor ; to enforce every security and all means of payment ; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor. This right of a surety also stands not upon contract, but upon a principle of natural justice”(t).

On the same foundation stands the right of the surety who has paid the debt, or the portion of it which he guaranteed, to stand in the creditor's place in the administration of the debtor's estate. The principle is undoubted, and the only difficulty is to be sure whether the surety has really guaranteed only a certain part of the debt, or is surety for the whole, but with a limit of liability (see on s. 128, p. 571 above).

“ When a surety is only a surety for a part of the debt, and has paid that part of the debt, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged ” (u). In such a case it may be said that “ the right of the surety arises merely by payment of the part, because that part, as between him and the principal creditor, is the whole.” But a surety who has become such, though with limited liability, in respect of the entire debt, has no rights by way of subrogation or in preference to the creditor until the creditor is fully paid (v).

Moreover, the benefit of this principle is intended to persons who, though not actually sureties, are in an analogous position. The indorser of a bill of exchange “ is primarily liable as principal on the bill, and is not strictly a surety for the acceptor ”; but “ he has this in common with a surety for the acceptor, that ” after notice of dishonour “ he is entitled to the benefit of all payments made by the acceptor, and is entitled, on paying the holder, to be put in a situation to have a right to sue the acceptor ” (w).

(t) *Craythorne v. Swinburne* (1890) 7 Ch. 680, 683, per Mellish, L. J.
 14 Ves. 160 ; 9 R. R. 264 ; and see Lord (v) *Re Sass* [1896] 2 Q. B. 12, 15.
 Eldon's judgment, 14 Ves. 169 ; 9 R. R. (w) *Duncan Fox & Co. v. North and South Wales Bank* (1880) 6 App. Ca. 270.
 1, 18, per Lord Blackburn.
 (u) *Gray v. Seckham* (1872) L. R.

A surety (or person in a similar position) who has paid his principal's debt is entitled, in the practice of the English Courts, to the same rate of interest as a stranger who has made advances (x). 140, 14

See as to the right of a payer of a bill of exchange for the honour of any party liable upon it the provisions of the Negotiable Instruments Act XXVI of 1881, s. 114.

141.—A surety is entitled to the benefit of every security, which the creditor has against the principal debtor at the time when the contract of surety-ship is entered into, whether the surety knows of the existence of such security or not; and, if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security (y).

Surety's right to benefit of creditor's securities.

Illustrations.

(a) C. advances to B., his tenant, 2,000 rupees on the guarantee of A. C. has also a further security for the 2,000 rupees by a mortgage of B.'s furniture. C. cancels the mortgage, B. becomes insolvent, and C. sues A. on his guarantee. A. is discharged from liability to the amount of the value of the furniture. [*Cp. Pearl v. Deacon* (1857) 1 De. G. & J. 461, where the creditor, being also the debtor's lessor, destroyed the security on the furniture by distraining for rent (which in English law is a paramount right).]

(b) C., a creditor, whose advance to B. is secured by a decree, receives also a guarantee for that advance from A. C. afterwards takes B.'s goods in execution under the decree, and then, without the knowledge of A., withdraws the execution. A. is discharged. [*Mayhew v. Crickett* (1818) 2 Sw. 185; 19 R. R. 57.]

(c) A., as surety for B., makes a bond jointly with B. to C., to secure a loan from C. to B. Afterwards C. obtains from B. a further security for the same debt. Subsequently C. gives up the further security. A. is not discharged. [The modern doctrine of English equity is *contra*; see below.]

Surety's right to benefit of securities.—"As a surety, on payment of the debt, is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the

(x) *Re Beulah Park Estate* (1872) L. R. 15 Eq. 43. (y) See s. 139, p. 596, above.

8. 141. contract of suretyship (z), if the creditor who has, or ought to have had, them in his full possession or power loses them or permits them to get into the possession of the debtor, or does not make them effectual by giving proper notice, the surety to the extent of such security will be discharged. A surety, moreover, will be released, if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as they formerly stood in his hands" (a).

"The surety in effect bargains that the securities which the creditor takes shall be for him, if and when he shall be called upon to make any payment" (b), or if a settlement of accounts is otherwise required, e.g., if the surety brings a redemption suit in respect of a security given by him (c). The creditor, however, is not bound to use extraordinary, or, it would seem, any, diligence about preserving or retaining a security which is in fact worthless (d).

It will be seen that the present section, by limiting the surety's right to securities held by the creditor at the date of his becoming surety, has adopted a view which was still not wholly abandoned in England when the Act was framed (e), but which has for a good many years been treated as untenable. One cannot help suspecting that this is not deliberate policy, but merely codification of equity somewhat out of date.

(z) See judgment of Hall, V.-C., in *Forbes v. Jackson* (1882) 19 Ch. D. 615, 619.

(a) 2 Wh. & T. L. C. 4th ed. 1002 (7th ed. 600, with some verbal alteration), approved by Hannen, J., *Wulff v. Jay* (1872) L. R. 7 Q. B. 756, 764; as to the last point, *Pledge v. Buss* (1860) Johns. 663.

(b) See judgment of Hall, V.-C., in *Forbes v. Jackson*, last note but one.

(c) *Dixon v. Steel* [1901] 2 Ch. 602 (surety, who had not been called on for payment, entitled to be credited in account with proceeds of security given by principal debtor). "It certainly is

not the law that a surety has no rights until he pays the debt due from his principal": p. 607.

(d) *Rainbow v. Juggins* (1880) 5 Q. B. Div. 422 (a policy on the debtor's life which had lapsed by non-payment of premiums).

(e) Blackburn, J., seems to have thought the point doubtful in 1876. See *Polak v. Everett*, 1 Q. B. D. at p. 676. We do not believe he would have found many equity lawyers to share his doubt. *Ugar Sen v. Lakmichand* (1910) 32 All 638; see *Pearl v. Deacon* (1857) 1 De G. & J. 461; 116 R. R. 89.

The rule is not confined to securities in any technical sense. A S. 141. v
 surety is entitled to the benefit of the principal debtor's set-off against the creditor, if it arises out of the same transaction; this follows from the surety's right to be indemnified by his principal, combined with the equitable maxim of avoiding circuity of action (f).

The High Court of Bombay has cited the reason of the present rule as laid down by Turner, V.-C. (g): "I take it to be, because, as between the principal and surety, the principal is under an obligation to indemnify the surety [see s. 145, p. 608, below]; and it is, as I conceive, from this obligation that the right of the surety to the benefit of securities held by the creditor is derived."

"To the extent of the value of the security."—Where a creditor sued the principal debtor and the surety on a mortgage bond, and in his plaint formally relinquished his claim against part of the mortgaged property which was worth the amount guaranteed by the surety, it was held that the surety was discharged (h).

When surety becomes entitled to benefit of creditor's securities.—Under s. 140, a surety is invested with the *rights* of the creditor as against the principal debtor *upon payment or performance of all that he is liable for*. The words last italicised are not repeated in the present section. The Act does not lay down at what point of time the surety is entitled to have the creditor's *securities* made over to him wholly or in part, whether it is when the debt of the creditor is paid off, or when the surety pays the amount of his guarantee. The point arose in *Goverdhandas v. Bank of Bengal* (i), where it was held that a surety was not entitled to the benefit of a portion of the creditor's securities until the whole of the debt due to the creditor was paid off. In that case a surety who had guaranteed *an aliquot* and defined portion of a past due debt secured by a mortgage claimed to be entitled, *on payment by him of the portion of the debt* which he had

(f) *Bechervaise v. Lewis* (1872) L. R. 1 C. P. 372.

(g) *Yonge v. Reynell* (1852) 9 Hare, at pp. 818, 819; *Goverdhandas v. Bank of Bengal* (1890) 15 Bom. 48, 63. The acts of the case in Hare were complicated by fraud, and are not thought

useful for any purpose of illustration. Cp. Sir S. Romilly's argument in *Craythorne v. Swinburne*, p. 599 above.

(h) *Narayan v. Ganesh* (1870) 7 B. H. C. A. C. 118.

(i) (1890) 15 Bom. 48.

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guaranteed, to share in the mortgage in proportion to the amount of the debt which he had guaranteed and paid before the mortgagee had been paid the full amount of his mortgage debt. Farran, J., in rejecting the surety's claim, said : " It seems to me to be a strange doctrine that a creditor not fully secured by a mortgage who obtains the benefit of a surety for part of his mortgage debt in order to further secure himself, by that very act is deprived of portion of the security the inadequacy of which was a reason for demanding the surety ; or that a person advancing say Rs. 10,000 on a mortgage which is valued only at Rs. 5,000 and has Rs. 5,000 of his advance guaranteed by a surety, is only in reality secured to the extent of Rs. 7,500 by reason of the surety's right to claim the benefit of half the mortgage security on paying his half of the debt. To hold so would, I think, defeat the intention of the parties to such a transaction. A principle of equity is seldom adopted which has that effect. If such were the result of s. 141 of the Contract Act, I should expect to find the wording of s. 140 repeated in s. 141. The striking difference in the language of the two sections is a strong argument against the plaintiff's contention " (j).

142.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee obtained by misrepresentation invalid.

The English authorities on the subject-matter of this and s. 143 will be best dealt with together under that section.

143.—Any guarantee which the creditor has obtained by means of keeping silence as to material circumstance is invalid.

Guarantee obtained by concealment invalid.

Illustrations.

(a) A. engages B. as clerk to collect money for him. B. fails to account for some of his receipts, and A., in consequence, calls upon him to furnish security for his duly accounting. C. gives his guarantee for B.'s duly accounting. A. does not acquaint C. with B.'s previous conduct. B.

afterwards makes default. The guarantee is invalid. [*Railton v. Mathews* (1844) 10 Cl. & F. 934; 59 R. R. 308 (k)].

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(b) A. guarantees to C. payment for iron to be supplied by him to B. to the amount of 2,000 tons. B. and C. have privately agreed that B. should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A. is not liable as a surety. [*Pidcock v. Bishop* (1826) 3 B. & C. 805; 27 R. R. 430.]

Guarantee obtained by misrepresentation or concealment.—English law is settled that, although the contract of suretyship is “one in which there is no universal obligation to make disclosure”—that is, it is not, like a contract of insurance, liable to be avoided by the mere non-disclosure of any material fact whatever—still the surety is entitled to know so much as will tell him what is the transaction for which he is making himself answerable; and he will be discharged if there is either active misrepresentation of the matter by the creditor, or silence amounting in the circumstances to misrepresentation. “Very little said which ought not to have been said, and very little not said which ought to have been said, would be sufficient to prevent the contract being valid” (l).

“It is the duty of a party taking a guarantee to put the surety in possession of all the facts likely to affect the degree of his responsibility; and if he neglect to do so, it is at his peril..... A surety ought to be acquainted with the whole contract entered into with his principal” (m).

Thus where a surety guarantees an agent's existing and future liabilities in account with his employer, and the agent is in fact already indebted to the employer for more than the full amount of the guarantee, and the statements made about his position are calculated to mislead, though not false in terms, this is evidence of material misrepresentation on the creditor's part (n).

(k) *Railton v. Mathews* followed, and the distinction between such intrinsic circumstances as were here not disclosed, and extrinsic ones such as a state of account, as in *Hamilton v. Watson*, note (o), p. 606, below, explained: *L. G. O. Co. v. Holloway* [1912] 2 K. B. 72, C. A.

(l) *Fry, J., Davies v. London and Provincial Marine Insurance Co.* (1878) 8 Ch. D. 469, 475.

(m) *Bayley, J., and Littledale, J., Pidcock v. Bishop*, 27 R. R. at pp. 433, 435.

(n) *Lee v. Jones* (1863) 17 C. B. N. S. 482, Ex. Ch. A minority of the

§. 148. But it is not every disclosure that a surety can require. Where a customer's credit with his bankers is guaranteed, the fact that the new credit is to be applied to paying off an existing debt of the customer to the bank is not such as need be disclosed. For this is nothing out of the ordinary course of business, but rather to be expected. The test is "whether there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction, that is, whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect" (o). The creditor's description of the transaction to be undertaken, if it makes no mention of any such circumstance, implies a representation that there is none (p).

Accordingly the creditor is not bound to tell the surety that the intended guarantee is to be in substitution for a former one given by some one else (q). Where the solvency of a surety for a debt is guaranteed in turn, the terms of the loan as between the creditor and the original debtor are not material for the last-mentioned guarantor's risk, and non-disclosure of them is no defence to an action on his guarantee (r).

To avoid a guarantee under this section it must be proved not only that there was silence as to a material circumstance, but that the guarantee was obtained by means of such silence (s). The meaning of the words 'keeping silence' in this section was considered by Sargent, C. J., in a Bombay case (t). The expression "keeping silence", said the learned Judge, "clearly implies intentional

Court dissented strongly on the facts, holding that it was the debtor's business to inform the sureties of his financial condition, and theirs to inquire of him rather than of his employers. Generally a surety is not the less bound though he may have acted on some misrepresentation made by the debtor : *Debendra Nath Dutt v. Adm.-Gen. of Bengal* (1906) 33 Cal. 713, 756.

(o) *Hamilton v. Watson* (1845) 12 Cl. & F. 109, 119; 60 R. R. 58, 65 (Lord Campbell).

(p) *Lee v. Jones*, note (n) last page, judgment of Blackburn, J.

(q) *North British Insurance Co. v. Lloyd* (1854) 10 Ex. 523; 102 R. R. 636.

(r) *Seaton v. Burnand* [1900] A. C. 135.

(s) *Per Cur. in Secretary of State for India v. Nilamekam* (1883) 6 Mad. 406, 408.

(t) *Balkrishna v. Bank of Bengal* (1891) 15 Bom. 585, 591. See also *Delhi and London Bank v. Hunter* (1871) 3 N.W.P. 264.

concealment as distinguished from mere non-disclosure, which no doubt is of itself a fatal objection in insurance policies, and virtually, we think, expresses what is laid down in *North British Insurance Co. v. Lloyd (u)*, that the withholding must be fraudulent, which necessarily must be the case when a material circumstance is intentionally concealed." S. 143.

"Material circumstance."—As to what amounts to this, further illustrations are afforded by the following cases:—

1. A. becomes surety to a bank for B.'s conduct as *khajanchi*, whose duties are to examine, verify, and guarantee all native signatures or documents for money. Before his appointment as *khajanchi* B. held the office of an ordinary clerk in the bank, and it was arranged between B. and the bank that he should continue to fill that office also. The bank do not acquaint A. with this part of the agreement. A. is liable as a surety (v).

2. In the above case, after B. assumes the office of *khajanchi*, the bank discovers that the names on certain bills discounted with them are forged, and they make a claim upon B., but B. repudiates his liability. The bank do not acquaint A. with this fact, and B. is allowed to continue in his office, and subsequently makes defalcations. A. is liable as a surety, for it could not have been assumed that B. was infallible in detecting forgeries, and the guarantee could not be said to be founded on that assumption (w).

3. A. purchases an *abkari* farm from Government subject to his furnishing the required security for the due fulfilment of the conditions of the lease. A. fails to furnish the security, and the farm is resold at his risk and on his account at a loss of Rs. 4,000, for which he becomes liable. A. purchases the farm at the resale, and B. stands surety for the performance of the conditions of the lease. B. is not informed by Government of A.'s liability for Rs. 4,000. B. is liable as a surety, the guarantee not extending to the liability for Rs. 4,000 (x).

(v) 10 Ex. 523, 532 102 R. R. 686, (w) *Balkrishna v. Bank of Bengal*, 694. last note.

(x) *Balkrishna v. Bank of Bengal* (1891) 15 Bom. 585. (z) *Secretary of State for India v. Nilamekam* (1883) 6 Mad. 406, 410.

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The language of these two sections, 142 and 143, is not very well fitted to exclude doubts whether they go beyond the English authorities or not. S. 143 might be read so as to impose on the creditor an unqualified duty of giving the surety full information of all material facts. But the words "obtained by means of keeping silence," coupled with the fact that the illustrations are both taken, with no substantial change, from English decisions, appear to limit the operation of the section to cases of wilful concealment which in fact amounts to a misrepresentation of what the surety is undertaking.

144.—Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join.

Guarantee on contract that creditor shall not act on it until co-surety joins.

A surety who "entered into the obligation upon the understanding and faith that another person would also enter into it... has a right in equity to be relieved on the ground that the instrument has not been executed by the intended co-surety" (y). Whether such a contract is to be inferred from the transaction as a whole is conceived (apart from the construction of any written document) to be purely a question of fact. The rule will not be extended to cases of joint and several obligation where the transaction is not really a guarantee, though that word may be used, but a primary undertaking (z).

145.—In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has right-fully paid under the guarantee, but no sums which he has paid wrongfully.

Implied promise to indemnify surety.

The surety hnd in this case was executed before the Contract Act came into force, and the Court stated that, whether s. 143 did or did not embody the rule of English law, the case was to be decided according to the principles of English law, and proceeded to

decide the case accordingly.

(y) *Evans v. Bremridge* (1856) 3 D. M. G. 100, 109, per Turner, L. J. Cp. *Bonser v. Cox*, p. 582, above.

(z) *Ex parte Hardinge* (1879) 12 Ch. Div. 557.

Illustrations.

(a) B. is indebted to C. and A. is surety for the debt. C. demands payment from A., and on his refusal sues him for the amount. A. defends the suit, having reasonable grounds for doing so, but is compelled to pay the amount of the debt with costs. He can recover from B. the amount paid by him for costs, as well as the principal debt.

(b) C. lends B. a sum of money, and A., at the request of B., accepts a bill of exchange drawn by B. upon A., to secure the amount. C., the holder of the bill, demands payment of it from A., and, on A.'s refusal to pay, sues him upon the bill. A., not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B. the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action.

(c) A. guarantees to C., to the extent of 2,000 rupees, payment for rice to be supplied by C. to B. C. supplies to B. rice to a less amount than 2,000 rupees, but obtains from A. payment of the sum of 2,000 rupees in respect of the rice supplied. A. cannot recover from B. more than the price of the rice actually supplied.

Surety's right to indemnity.—The proposition "that, as soon as his obligation to pay is become absolute, [a surety] has a right in equity to be exonerated by his principal" (a) is treated throughout the English authorities as fundamental, and as furnishing the reason for several of the more specific rules (see p. 603, above). It depends in turn on the more extensive principle laid down in s. 69 (p. 374, above). In the second clause of the section the words "rightfully" and "wrongfully" do not seem felicitous. There is nothing wrongful in paying money which one need not have paid, and for which therefore one cannot have a remedy over against the principal debtor. One would rather have expected "reasonably" and "unreasonably." Here, again, a wider rule is applied to the special case of the contract of suretyship (b). Further, it has long been settled in England that "a surety is entitled to come" to the Court "to compel the principal debtor to pay what is due from him," provided that an ascertained debt is actually due; and this relief is not limited, as at one time supposed, to cases where the creditor has refused to sue the principal debtor (c).

(a) *Bechercaise v. Lewis* (1872) L. R. 79, cited on s. 73, Illustration (j) 7 C. P. 372, 377.

(b) See *Aguis v. G. W. Colliery Co.* (c) *Aecherson v. Tredegar Dry Dock* [1899] 1 Q. B. 413, C. A.; *Hammond etc., Co.* [1909] 2 Ch. 401, 406.

• *Co. v. Bussey* (1887) 20 Q. B. Div.

B. 145. It is not to be inferred from the language of this section that the surety might not, in an appropriate case, be entitled to recover for special damages beyond the sum he has actually been compelled to pay. His right is not merely a right to stand in the creditor's place, but is founded on an independent equity (*d*).

On the other hand, the surety's only claim is to be fully indemnified. He cannot compound the debt for which he is liable, and then proceed as if he stood in the creditor's place for the full amount. "Where a surety gets rid of and discharges an obligation at a less sum than its full amount, he cannot, as against his principal, make himself a creditor for the whole amount; but can only claim, as against his principal, what he has actually paid in discharge of the common obligation" (*e*).

"Whatever sum he has rightfully paid."—This expression includes "not only coin, but also property, of whatever kind, which is parted with in lieu of money, but not the mere incurring of a pecuniary obligation of the creditor in lieu or discharge of the debt owing to him" (*f*). The giving, therefore, by the surety of a promissory note jointly with a third party as his surety, though accepted by the creditor as payment of the debt and not as a mere collateral security therefor, cannot be treated as payment as between the surety and the principal debtor (*g*). The reason is that, the principal debtor being bound to indemnify the surety, the cause of action cannot be merely the procuring by the surety of the principal debtor's exoneration from liability to the creditor, but must also include the surety being himself damnified (*h*); and the surety cannot be said to be damnified unless the payment is actually made.

Guarantee without concurrence of principal debtor.—Where a person becomes a surety without the knowledge and consent of the principal debtor, the only rights which he acquires are those given by ss. 140 and 141, and not those given by this section (*i*).

(*d*) See per Stirling, J., *Badeley v. Consolidated Bank* (1886) 34 Ch. Div. at p. 556. The reversal of the decision on the main point, 38 Ch. Div. 236, does not affect this.

(*f*) Per Bhashyam Ayyangar, J., in *Putti Narayanamurthi v. Marimuthu* (1902) 26 Mad. 322, 328.

(*g*) *Ib.*

(*h*) *Ib.* 326.

(*e*) *Reed v. Norris* (1837) 2 My. & Cr. 361, 375; 45 R. R. 88, 94 (Lord Cottenham).

(*i*) *Muthu Raman v. Chinna Vellayan* (1916) 39 Mad. 965.

A surety paying a debt which is barred by limitation cannot be said to have paid "rightfully" within the meaning of this section (j). 88.
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146.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Co-sureties liable
to contribute
equally.

Illustrations.

(a) A., B., and C. are sureties to D. for the sum of 3,000 rupees lent to E. E. makes default in payment. A., B. and C. are liable, as between themselves, to pay 1,000 rupees each.

(b) A., B., and C. are sureties to D. for the sum of 1,000 rupees lent to E., and there is a contract between A., B. and C. that A. is to be responsible to the extent of one-quarter, B. to the extent of one-quarter, and C. to the extent of one-half. E. makes default in payment. As between the sureties, A. is liable to pay 250 rupees, B. 250 rupees, and C. 500 rupees.

Contribution by co-sureties.—This has long been elementary. The earliest case usually cited settled that the co-sureties need not be bound under the same contract and laid down that the right to contribution is independent of any agreement for that purpose (k).

It must be observed that a "surety has no claim against his co-sureties until he has paid more than his share of the debt to the principal creditor" (l), for only then does it become certain that there is ultimately any case for contribution at all. But a judgment

(j) *Suja v. Pakhean* (1878) 10 P. 153; 55 R. R. 547, 559. It is not enough that he has paid more than his share of a part of the debt which has become due: *Shirley v. Bardett* [1911] 2 Ch. 418. It must be determined by the circumstances of each case whether there is an indivisible principal debt or severable debts.

(k) *Dering v. Earl of Winchelsea* (1787) 1 Cox, 318; 2 Bos. & P. 270; 1 R. R. 41; and see other judgments cited by Wright, J., in *Wolmershausen v. Gullick* [1893] 2 Ch. at p. 523 *sqq.*

(l) *Ex parte Snowden* (1881) 17 Ch. Div. 44, 48, per Brett, L.J., following

8. 146. against the surety at the suit of the creditor for the full amount of the guaran'ee (or an equivalent process, such as the allowance of a claim for the sum in the administration of the surety's estate) will have the same effect as payment for this purpose, and entitle the surety or his representatives to a declaration of the right to contribution ; it seems that this is a matter of purely equitable jurisdiction (m). The like principles apply to contribution among co-trustees (n).

All the co-sureties are entitled to share in the benefit of any security or indemnity which any one of them has obtained from the principal debtor, and this whether they knew of it or not (o). The surety bringing in, under this rule, what he receives from his security, may resort again to that security for the liability to which he remains subject, and the co-sureties may again claim the benefit of participation, and so on until the co-sureties have been fully reimbursed or the counter-security exhausted (p).

There is no right of contribution between persons who become sureties not for the same debt, but by distinct and separate obligations for different portions of a debt (q). Nor is there any such right between an ultimate surety for payment of a debt and a person who, though a surety as between himself and the principal debtor, has authorised the creditor to treat him as a principal. Where B. joined with A. in a mortgage of A.'s property to Z., and agreed to be considered, as regards Z., as a principal debtor for the whole, though as between A. and himself he was a surety, and the debt was insured with M., who knew the terms of B.'s engagement, in the name of Z., M. undertaking to pay the debt on notice that Z.'s power of sale had become exercisable, it was held that M. was a guarantor to Z. against the default of both A. and B., and was not a co-surety with B. (r). An express contract between Z. and M. that M. was to be a surety for,

(m) *Wolmershausen v. Gullick* [1893] Ch. D. 168.
 2 Ch. 514. (q) *Coope v. Twynam* (1823) Turn. & Russ. 426 ; 24 R. R. 89.
 (n) *Robinson v. Harkin* [1896] 2 Ch. 415. (r) *Re Denton's Estate* [1904] 2 Ch. 178, C. A., following the distinction laid down in *Craythorne v. Swinburne* (1807) 825.
 (o) *Steel v. Dixon* (1881) 17 Ch. D. 178, C. A., following the distinction laid down in *Craythorne v. Swinburne* (1807) 825.
 (p) *Berridge v. Berridge* (1890) 44 14 Ves. 160 ; 9 R. R. 264.

but not *with*, B., by way of "collateral security," would have the same effect (s).

8a.
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147.—Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Liability of co-sureties bound in different sums.

Illustrations.

(a) A., B., and C., as sureties for D., enter into three several bonds, each in a different penalty, namely, A. in the penalty of 10,000 rupees, B. in that of 20,000 rupees, C. in that of 40,000 rupees, conditioned for D.'s duly accounting to E. D. makes default to the extent of 30,000 rupees. A., B., and C. are each liable to pay 10,000 rupees.

(b) A., B., and C., as sureties for D., enter into three several bonds, each in a different penalty, namely, A. in the penalty of 10,000 rupees, B. in that of 20,000 rupees, C. in that of 40,000 rupees, conditioned for D.'s duly accounting to E. D. makes default to the extent of 40,000 rupees. A. is liable to pay 10,000 rupees, and B. and C. 15,000 rupees each.

(c) A., B., and C., as sureties for D., enter into three several bonds, each in a different penalty, namely, A. in a penalty of 10,000 rupees, B. in that of 20,000 rupees, C. in that of 40,000 rupees, conditioned for D.'s duly accounting to E. D. makes default to the extent of 70,000 rupees. A., B., and C. have to pay each the full penalty of his bond.

The wording of this section and its effect as shown by the illustrations are perfectly clear, and the question why it says "equally" and not "rateably," thus making what seems an arbitrary departure from the rule as previously understood, is not one which we have any means of answering. There is no variation between this section and the original draft.

CHAPTER IX.

OF BAILMENT.

148.—A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering

"Bailment,"
"bailor," and
"bailee" defined.

(s) *Craythorne v. Swinburne*. (1807) 14 Ves. 160; 9 R. R. 264.

- §. 148. them. The person delivering the goods is called the "bailor." The person to whom they are delivered is called the "bailee."

Explanation.—If a person already in possession of the goods of another contracts to hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor, of such goods although they may not have been delivered by way of bailment.

The late Mr. Justice Story's (*t*) works on bailment and agency acquired a classical reputation, and were largely used in this and the following chapter by the framers of the present Act, on the whole with very good results. But, as those works have not been re-edited for many years, and have, in England at any rate, ceased to be in common use, though fairly recent judicial citations occur, it is not thought worth while to furnish the text of the Act, which after all is its own sufficient authority, with specific references to them.

Nature of the transaction.—"Bailment" is a technical term of the Common Law, though etymologically it might mean any kind of handing over (*Fr. bailleur*). It involves change of possession. One who has custody without possession, like a servant, or a guest using his host's goods, is not a bailee. But constructive delivery will create the relation of bailor and bailee as well as actual, as stated in the *Explanation*.

The bailee's duty to deal with the goods according to the bailor's orders is incidental to the contract of bailment, and arise on the delivery of the goods, although these orders may have already been given and accepted in such a manner as to constitute a prior special contract (*u*). As a matter of pleading this is no longer material in England or India, but it might still be material with regard to the period of limitation.

(*t*) Of the Supreme Court of the United States from 1811 to 1845. Story was not a subtle or always a thorough critic in dealing with authorities, but he was an admirable exponent of the common sense of the law when the state

of authority left him a free hand. He drew largely on Pothier and other civilian writers.

(*u*) *Streeter v. Horlock* (1822) 1 Bing. 34 ; 25 R. R. 579.

Bailment is necessarily dealt with by the Contract Act only so far as it is a kind of contract. It is not to be assumed that without an enforceable contract there cannot in any case be a bailment. In England the conviction of an infant for the statutory offence of larceny by a bailee has been upheld (v). "It is conceived," says Sir R. S. Wright (w), "that in general any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an undertaking with the other person either to keep or return or deliver to him the specific thing or to convey and apply the specific thing according to the directions antecedent or future of the other " person."

The words "otherwise disposed of" in the present section express the common law as now understood. "It seems clear that a bailee is not the less a bailee because he is clothed with authority to sell the thing which is bailed to him," *e.g.*, a factor for sale (x). On the whole a bailment may be described as a delivery on condition, to which the law usually attaches an obligation to redeliver the goods, or otherwise deal with them as directed, when the condition is satisfied; but there may be, in particular cases, a bailment without an enforceable obligation (y).

Where a chattel is delivered by mistake, the intention being to deliver another chattel either with or without conditions, the legal result, whatever it may be, is not a bailment; for there is no intention at all to deliver the chattel which is in fact delivered, and no contract with respect to it. The late Lord Coleridge's opinion "that bailment is not a mere delivery on a contract, but is a contract itself" (z), may not be a very clear or convincing reason for this proposition, but does not affect its truth. The problems which arise in this connection are, however, outside the scope of this Act.

The judgment of Holt, C.J., in *Coggs v. Bernard* (a) is celebrated as the first judicial exposition of this branch of law, as indeed it is

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|---|---|
| (v) <i>R. v. McDonald</i> (1885) 15 Q. B. D. 323. (No such question could arise under the Indian Penal Code.) | (y) Judgment of Cave, J., <i>R. v. McDonald</i> (1885) 15 Q. B. D. at p. 328. |
| (w) Pollock and Wright on possession, 163. | (z) <i>R. v. Ashwell</i> (1885) 16 Q. B. D. at p. 223. |
| (x) Sir R. S. Wright, <i>op. cit.</i> 161, 162. | (a) (1703) 2 Ld. Raym. 909; 1 Sm. L. C. 173. |

§. 148. one of the earliest attempts, outside the law of real property, to give a connected and rational exposition of any branch of the common law as a whole. But the somewhat minute distinctions there laid down were really taken from the Roman law through Bracton, and, whether they were ever operative in the law of England or not, they are not adopted in this Act (see s. 151, p. 619, below).

One result of Holt's reliance on Bracton is that in later times English Courts have felt themselves rather specially free to refer to the Roman law in questions on the contract of bailment (*b*), but this is now in India, and probably in England, rather a matter of literary curiosity than anything else.

No bailment where whole property transferred.—Obviously no transaction can be a bailment within the Act which does not satisfy the terms of this section. Accordingly there is not a bailment if the thing delivered is not to be specifically returned or accounted for : and so is the common law.

A delivery of property on a contract for an equivalent in money or in other commodities (whether like the property delivered or not) is a sale or exchange and not a bailment, as where farmers deliver grain to a miller to be used by him in his trade, and are entitled to claim an equal quantity of corn of like quality or its market price (*c*).

An agent authorised to receive payment, and bound to hand over to his principal an equivalent sum, but not necessarily the actual coin or instruments of credit received by him, is not a bailee (*d*).

Similarly the delivery of Government promissory notes to a treasury for cancellation and consolidation into a single note is not a bailment, for there is no contract in such a case that the notes shall be returned or otherwise disposed of according to the directions of the owner (*e*).

Again the relation between a native banker and the person depositing money with him in the ordinary way of business is that of

(*b*) See the judgment of the Court in *Blakemore v. Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035, 1050 ; 112 R. R. 880, 887.

(*c*) *South Australian Insurance Co. v. Randell* (1869) L. R. 3 P. C. 101.

(*d*) See *Bridges v. Garrett* (1870) L. R. 5 C. P. 451, in Ex. Ch., judgment of Blackburn, J.

(*e*) *Secretary of State for India in Council v. Sheo Singh* (1880) 2 A.L. 756, 760.

borrower and lender, and the money so lodged can be recovered only as "money lent" under art. 59 of the Limitation Act, and not as "money deposited" under an agreement that it shall be "payable on demand" under art. 60. In the former case the period of limitation runs from the date of the loan, and in the latter from the date of demand (*f*). "The mere use of the term 'deposit' cannot alter the substance of the transaction" (*g*). It is in each case a question of fact whether a transaction amounts to a mere loan or a deposit under art. 60 (*h*).

149.—The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

Delivery to bailee
how made.

See the sections on Delivery (90—94) in the chapter on the Sale of Goods, pp. 490-502 above.

The bailor's part need not be very active. Mere assent, for example, of a guest at a place of public entertainment to a servant's officious assumption of custody may be sufficient evidence of delivery to make the proprietor of the house a bailee and responsible for loss (*i*).

150.—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and, if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Bailor's duty to
disclose faults in
goods bailed.

(*f*) *Ichha Dhanji v. Natha* (1888) 13 Bom. 338.

(*g*) *Per Cur. in Ram Sukh v. Brohmoyi Dasi* (1879) 6 C. L. R. 470.

(*h*) *Ishur Chunder v. Jibun Kumari* (1888) 16 Cal. 26; *Perundevilayar v. Nammalvar* (1895) 18 Mad. 390; *Dorabji v. Muncherji* (1894) 19 Bom. 352, 20 app. ib., p. 775. Cp. *Re Tidd* [1893]

3 Ch. 154, where there seems to be some want of adequate distinction between a deposit of specific goods or coins and a deposit in the banking sense, i. e., a loan not immediately repayable, though the decision is clearly correct.

(*i*) *Ultzen v. Nicols* [1894] 1 Q. B. 92, which really decides very little.

0. If the goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

Illustrations.

(a) A. lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B. is thrown and injured. A. is responsible to B. for damage sustained.

(b) A. hires a carriage of B. The carriage is unsafe, though B. is not aware of it, and A. is injured. B. is responsible to A. for the injury. [*Hyman v. Nye* (1881) 6 Q. B. D. 685].

There is no doubt that such is the common law, though there is not much positive authority. The rule of Roman law is that if a man knowingly lends his neighbour foul or leaky vessels, whereby the wine or oil put into them perishes or is lost, he is liable for the damage (*j*); and this was approved in a modern case by the Court of Queen's Bench, though it was decided that the plaintiff, on the facts, represented a person who was not a party to a contract of loan for use, or any contract at all, with the defendants. The case of Illustration (a) is put by the Court and treated as clear. "Would it not be monstrous to hold that if the owner of a horse, knowing it to be vicious and unmanageable, should lend it to one who is ignorant of its bad qualities and conceals them from him, and the rider, using ordinary care and skill, is thrown from it and injured, he should not be responsible? By the necessarily implied purpose of the loan a duty is contracted towards the borrower not to conceal from him those defects known to the lender which may make the loan perilous or unprofitable to him" (*k*). It is equally certain that a gratuitous lender is not liable for defects in the things lent of which he is not aware (*l*).

A person who delivers to a carrier goods which he knows to be of a dangerous character, such as explosives, and to require extraordinary care in handling, and omits to give warning of it (the nature of

(j) D. 13, 8, commod. 18, §3 (Gaius). 112 R. R. 880, 888.

(k) *Blakemore* (or *Blackmore*, 27 (l) *MacCarthy v. Young* (1861) 6 H. L. J. Q. B. 167) v. *Bristol and Exeter Ry. Co.* (1858) 8 E. & B. 1035, 1051.

the goods not being apparent), is liable for any resulting damage (m). But this duty seems to be independent of the contract of bailment, and antecedent to the formation of any contract between the parties. Ss. 150, 151.

With regard to Illustration (b) there is some doubt whether in England the rule would apply to the case where A. hires of B. a specific carriage, not a carriage to be provided by B. at his discretion. But the decisions upon the hiring of particular kinds of property turn rather on questions of implied warranty, or unexpressed terms of the contract, and must be used with great caution for the establishment of any general rules (n).

It does not seem, at all events, that the quite positive language of the second paragraph of the present section would be qualified in India by any such exception.

151.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

This section abolishes the distinctions in the amount of care required of various kinds of bailees which were established, or supposed to be established, by the judgment of Holt, C. J., in *Coggs v. Bernard*(o). By modern English law a gratuitous bailee is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description (p), and it does not seem that in practice an ordinary bailee for reward is bound to anything more (q). Even a gratuitous bailee must use such skill as he actually possesses, or by his profession

(m) *Lyell v. Ganga Dai* (1875) 1 All. 60; *Farrant v. Barnes* (1862) 11 C. B. N.S. 553; 132 R. R. 667.

(n) *Robertson v. Amazon Tug and Lighterage Co.* (1881) 7 Q. B. Div. 598 (steam-tug with engines damaged, unknown to both parties). On the other hand, an agreement to let a furnished house implies a condition that it shall

be fit for occupation at the date fixed for commencement of the tenancy: *Wilson v. Finch-Hatton* (1877) 2 Ex. D. 336. This of course is not a bailment. (o) P. 615 above. (p) *Giblin v. McMullen* (1869) L. R. 2 P. C. 317, 339. (q) *Searle v. Laverick* (1874) L. R. 9 Q. B. 122.

5. 151. or condition may reasonably be expected to possess ; a man who undertakes to show off a horse is presumed to be a complete rider (r). So that the obligation of bailees for hire, defined as being "to exercise the same degree of care towards the preservation of the goods entrusted to them from injury which might reasonably be expected from a skilled storekeeper, acquainted with the risks to be apprehended either from the character of the storehouse itself or of its locality" (s), does not carry the matter much farther.

A special and higher responsibility, not being part of the ordinary law of bailment at all, was imposed by the law of England upon common carriers and innkeepers (t). How far this remains unaffected by the Contract Act in India must be separately considered.

Common carriers.—The provisions of ss. 151 and 152 of the Contract Act embody in effect the common law rule as to the liability of bailees other than common carriers and innkeepers. The measure of care required of these bailees in respect of goods entrusted to them was the same as a man of ordinary prudence would take of his own goods ; in other words, the liability was one for *negligence* only, in the absence of special contract. Common carriers (u) and innkeepers, on the other hand, were liable as insurers of goods ; that is, they were responsible for every injury to the goods occasioned by *any means whatever*, except only the act of God and the King's enemies. Therefore the mere proof of delivery of goods and injury thereto, unless caused by the act of God or the King's enemies, was sufficient to entitle the plaintiff to compensation without proof of negligence on the part of the defendant (v). These principles of the English common

(r) *Wilson v. Brett* (1843) 11 M. & W. 113 ; 63 R. R. 523.

(s) *Brabant & Co. v. King* [1895] A. C. 632, 640, J. C.

(t) It would be useless for Indian purposes to speak of the later modifications introduced by statutes.

(u) "Common carrier" denotes a person, other than the Government, engaged in the business of transporting for hire property from place to place, by land or inland navigation, for all

persons indiscriminately : Carriers Act III of 1865, s. 2.

(v) Carriers of passengers are not liable as insurers so as to render them liable under all circumstances for not carrying the passengers safely. Their duty is to exercise reasonable care and diligence, and they cannot, therefore, be held responsible except for neglect of that duty ; *East India Ry. Co. v. Kalidas* (1901) 28 Cal. 401 ; L. R. 28 Ind. Ap. 144.

law applied in India (*w*), but they were subsequently modified by legislation as respects common carriers, and the Carriers Act III of 1865 now enables a bailee of this class to limit his liability by special contract in the case of certain goods, but not so as to get rid of liability for negligence (*x*). The question whether the liability of common carriers was still further reduced by the enactment of ss. 151 and 152 of the Contract Act, so as to render them liable for negligence only as in the case of other bailees, came up before the High Court of Bombay in 1878. That Court held that the definition of "bailment" in s. 148 was large enough to include bailment for carriage (*y*), and that the provisions of those sections, therefore, applied to common carriers, so as to supersede altogether the stringent rule of the English common law (*z*). The High Court of Calcutta, on the other hand, held in a subsequent case that the liability of common carriers was not affected by the Contract Act (*a*). The same point arose before the Judicial Committee of the Privy Council in an appeal from the Court of the Recorder of Rangoon, where it was held, approving the Calcutta decision, that the duties and liabilities of a common carrier in India are governed by the principles of the English common law in conjunction with the provisions of the Carriers Act, and that, notwithstanding some general expressions in the chapter on Bailments, the responsibility of a common carrier is not within the Contract Act (*b*). The decision proceeded on the grounds (1) that, if the liability of a common carrier was governed by ss. 151 and 152 of the Contract Act, the provisions of ss. 6 and 8 of the Carriers Act would be rendered *nugatory*, though s. 1 of the Contract Act declares that nothing in that Act contained shall affect the provisions of any Act not thereby "expressly repealed," and the Carriers Act is not one of the Acts so repealed; (2) that at the date of the Contract Act the law in force in British India relating to common carriers was partly written, being the Carriers Act, and partly

(*w*) *Irrawaddy Flotilla Co. v. Bugwandas* (1891) 18 Cal. 620, 625; L. R. 18 Ind. Ap. 121; *Whalley v. Palanji* (1866) 3 B. H. C. O. C. 137.

(*x*) Ss. 6 and 8.

(*y*) The only section in which bailment for the purpose of carriage is mentioned is s. 158. That section, however, deals merely with gratuitous bail-

ments.

(*z*) *Kurjerji v. G. I. P. Ry. Co.* (1878) 3 Bom. 109.

(*a*) *Moothora Kant v. I. G. S. N. Co.* (1833) 10 Cal. 166.

(*b*) *Irrawaddy Flotilla Co. v. Bugwandas* (1891) 18 Cal. 620; L. R. 18 Ind. Ap. 121.

3. 151. unwritten, being the English common law, which together formed a code at once simple, intelligible, and complete, and that, had it been intended to codify the law of common carriers by the Contract Act, the more usual course would have been to repeal the Carriers Act and to re-enact its provisions, instead of sweeping away the common law by a side wind and leaving the law on the subject to be gathered from two Acts ; and (3) that the mere fact that the Contract Act treats of bailments in a separate chapter, and that the definition of bailment is wide enough to include bailment for carriage, does not show any intention to abrogate the common law rule, for the Act, as appears from the preamble thereto, does not purport to do more than to define and amend certain parts of the law relating to contracts. The result is that the rights and liabilities of common carriers are outside the Indian Contract Act, and they are governed by the principles of English law as modified by the Carriers Act of 1865 (c).

Carriers by sea for hire are not common carriers within the meaning of the Carriers Act III of 1865 (d). There is a conflict of decisions as to whether the liability of such carriers is governed by the common law of England or by the provisions of ss. 151 and 152 of this Act. The High Court of Calcutta has held that a foreign company (which in that case was a French Company) are not common carriers in the ordinary English sense of the word, and that if the contract of affreightment is made in British India (which in that case was made in Calcutta), their liability was governed by the provisions of ss. 150 and 151 (e). On the other hand, the High Court of Madras has in a case in which the same company were defendants and the contract of affreightment was also made in Calcutta, that the company were none the less common carriers because they were a foreign company, and that the liability of the company was governed by the common law of England, and not by the provisions of this section. " The

(c) *British and Foreign Marine Insurance Co., Ltd. v. India General Navigation and Railway Co., Ltd.* (1910) 38 Cal. 28.

(d) *Kumber v. The B. I. S. N. Co.* (1913) 38 Mad. 941 ; *Boggiano & Co. v. The Arab Steamers Co., Ltd.* (1916) 40 Bom. 529, 535-536. See Carriers

Act III of 1865, s. 2 which defines a common carrier. But see *India General Steam Navigation Co. v. Bhagwan Chandra Pal* (1913) 40 Cal. 716, 718.

(e) *Mackillican v. Compagnie des Messageries Maritimes de France* (1880) 6 Cal. 227.

contract," said the Court, " was made at Calcutta, and whatever the nationality of the defendants or their ship, the law applicable to them is the *lex loci contractus*. The *lex loci* is the law of England; the defendants are therefore in our opinion common carriers, and the English law as to common carriers applies to them." (f) S. 151.

Carriers by Railway.—The liability of carriers by railway is now governed by the Railways Act IX of 1890. S. 72 of that Act provides that the responsibility of a railway administration (g) for injury to goods delivered to it to be carried by railway is, subject to the other provisions of the Act, that of a bailee under ss. 151, 152, and 161 of the Contract Act, and that it shall not be affected by the common law of England or the Carriers Act, but that it may be limited by a special agreement between the parties, provided that it is in writing signed by or on behalf of the person sending the goods and is otherwise in a form approved by the Governor-General in Council. Several railway companies in India have accordingly issued what is called " the risk note" in a form approved by the Governor-General in Council, which is used when the sender elects to despatch at a " special reduced" or " owner's risk" rate articles for which an alternative " ordinary" or " railway risk" rate is quoted in the tariff. The " risk note" provides that, in consideration of the railway company carrying the goods at a special reduced rate, they shall be exempted by the sender from liability for loss or damage to the goods from any cause whatever before, during, or after transit over the railway or other railways working in connection therewith. Such a note signed by the sender constitutes a special contract within the meaning of s. 72, and a railway company

(f) *Haji Ismail Sait v. The Company of the Messageries Maritimes of France* (1905) 28 Mad. 400. The suit was against the company for damage caused to the goods by landing them in rain, and it was held that, though the act amounted to negligence on the company's part, they were exempted from liability by a clause in the bill of lading which provided that the company should not be liable for the negligence of its servants. *Kumber v. The B. I. S. N. Co., Ltd.* (1913) 38 Mad. 941; *Mylappa Chettiar v. The B. I. S. N. Co., Ltd.* (1918) 34 Mad. L. J. 553, 557.

(g) " Railway administration " in the case of a railway administered by the Government or a native State means the manager of the railway, and includes the Government or the native State, and, in the case of a railway administered by a railway company, means the railway company : s. 3, cl. 6, of Railways Act.

151. cannot, therefore, be rendered liable on such a note, whatever may be the cause of injury to the goods (*h*).

Innkeeper.—It has recently been held by the High Court of Allahabad that the liability of a *guest* in respect of *goods belonging to a hotel-keeper* and used by the guest is that of a bailee under ss. 151 and 152 of this Act, so that the guest is not responsible for the loss, destruction, or deterioration of the furniture in his use if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own (*i*). On the other hand, it was held by the Bombay High Court, in a case which arose six years before the date of the Contract Act, that the liability of a *hotel-keeper* in respect of *goods belonging to a guest* was governed by the common law of England (*j*). According to that law, an innkeeper is liable for loss or damage of goods belonging to the guest, unless the loss or damage arises from the guest's negligence, the act of God or the King's enemies (*k*). In the Bombay case, however, the hotel was in Bombay, the hotel-keeper was a Parsi, and the guest was a European, and the decision was entirely confined to these facts, the Court declining to consider what the liability would have been if either of the parties was a Hindu or a Mahomedan. Again, it is not clear what the decision would have been if the case arose in the Mufassal, where the English common law had not been introduced. To us it appears that the liability of an innkeeper would now be governed by the provisions of ss. 151 and 152. None of the arguments in support of the view that the Contract Act does not affect the common law liability of a common carrier apply to the case of an innkeeper. In

(*h*) *Tippanna v. Southern Maratha Ry. Co.* (1892) 17 Bom. 417; *Balaram v. Southern Maratha Ry. Co.* (1894) 19 Bom. 159; *East India Ry. Co. v. Bunyad Ali* (1895) 18 All. 42; *Toonya Ram v. East India Ry. Co.* (1902) 30 Cal. 257. See also *Jalim Singh v. Secretary of State* (1904) 31 Cal. 951; *Ladhu v. S. P. & D. Railway* (1886) *Punj. Rec.* no. 97; *Arunachellam v. Madras Railway Co.* (1909) 33 Mad. 120; *Narain v. E. I. Railway Co.* (1912) 34 All. 656; *East India Ry. Co. v. Nilkanta Roy* (1914) 41 Cal. 576; *East India Railway Co. v. Shiv Proad* (1912) 17 Cal. W. N. 529; *Rohilkhand & Kumaon Ry. v. Ismail Khan* (1915) 13 All L. J. 417.

(*i*) *Rampal Singh v. Murray & Co.* (1899) 22 All. 164.

(*j*) *Wateley v. Palanji* (1866) 3 B. H. C. O. C. 137, 146.

(*k*) *Calye's Case*, 1 Smith's L. C., 11th ed. 119; *Morgan v. Ravey* (1861) 6 H. & N. 265.

the first place, there is nothing to show that the common law rule as to the liability of an innkeeper has been recognised throughout India, as is the case with common carriers. In the next place, there is no Indian enactment relating to innkeepers, similar to the Carriers Act with which the provisions of ss. 151 and 152, if applied to innkeepers, could conflict (l).

Burden of Proof.—In cases governed by the provisions of ss. 151 and 152, the loss or damage of goods entrusted to a bailee is *prima facie* evidence of negligence, and the burden of proof, therefore, to disprove negligence lies on the bailee. The same rule applies, by reason of s. 72 of the Railways Act, to a railway administration (m), unless the goods are consigned under a risk-note under which the railway company are absolved from all liability for loss or damage except that due to wilful negligence on the part of their servants in which case the burden lies on the consignor to prove negligence on the part of the railway company (n). As regards goods delivered to a common carrier, he is liable even if there be no negligence on his part except in certain cases mentioned above (see note "common carriers"). Under s. 6, however, of the Carriers Act he may by special contract limit his liability, but even then the burden lies on him, by reason of s. 9 of the Act, to disprove negligence (o).

There is a special class of cases where goods are destroyed by fire arising from some unknown cause, while they are in the possession of a common carrier or a railway company. In *River Steam Navigation Company v. Choutnull* (p), which was a suit against common carriers for loss of goods occasioned by fire which originated from some unknown cause, the Judicial Committee said: "It appears that the defendants have not at all exonerated themselves from the onus cast

(l) In England the common law liability of an innkeeper has been limited by the Innkeeper's Liability Act, 1863.

(m) *Nanku Ram v. Indian Midland Ry. Co.* (1900) 22 All. 361; *Surendra Lal v. Secretary of State for India* (1917) 25 Cal. L. J. 37, 40; *Hirji Khotsey & Co. v. B. B. & C. I. Ry. Co.* (1915) 39 Bom. 191.

(n) *Sheobarut Ram v. The Bengal N. W. Ry. Co.* (1912) 16 Cal. W. N. 766.

(o) *River Steam Navigation Co. v. Choutnull* (1899) L. R. 26 I.A.1, 26 Cal. 398, affmg. 24 Cal. 786; *India General Steam Navigation Co. v. Bhagwan Chandra Pal* (1913) 40 Cal. 716. See also *India General Steam Navigation Co. v. Gopal Chandra* (1914) 41 C. 80, 87-88.

(p) (1899) L. R. 26 I.A. 1, 26 Cal. 398 affmg. 24 Cal. 726.

3. 151. upon them of showing that the fire originated from causes over which they had no control and could not have been expected to have had any control." This does not mean that a railway company must be held liable for every accident of which it cannot assign the precise cause ; it is enough to satisfy the Court that due care has been used both generally and in respect of the plaintiff's goods (q). In a recent case, where the suit was one for damages for loss of cargo by fire, the Judicial Committee, after referring to ss. 151 and 152, observed as follows:—

"The weight to be attached to the judgment of the learned Judge of first instance, who saw the witnesses, is a good deal lessened by reason of his having apparently thrown the burden of proof on the wrong party. He states that it was, in his opinion, incumbent upon the defendant company to satisfy him that they had taken such care of these goods as a man of ordinary prudence would take of his own goods. This, in their Lordships' view, is not a correct statement of the law.

"It is true that under the Law of Evidence Act of 1872, s. 106, 'when any fact is especially within the knowledge of any person, the burden of proving that fact is on him'; and it was therefore right that the defendant company should call the material witnesses who were on the spot, as it seems to have done. But this provision of the law of evidence does not discharge the plaintiffs from proving the want of due diligence, or (expressing it otherwise) the negligence of the servants of the defendant company.

"It may be for the company to lay the materials before the Court ; but it remains for the plaintiffs to satisfy the Court that the true inference from those materials is that the servants of the defendant company have not shown due care, skill and nerve." (r).

As regards bailments for hire, the rule has thus been stated by Strachey, C.J.: "If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence ; otherwise I think the owner must give some evidence of negligence" (s). Thus where a

(q) *Lakkichand v. G. I. P. Ry. Co.* (1913) 37 Bom. L., 18-18; *Hirji Khetsey & Co. v. B. B. & C. I. Ry. Co.* (1915) 39 Bom. 191, 209-210. We cannot, of course, pursue in this work the distinctions to be made in applying the principle, independent of contract, commonly referred to by the catch-word "*res ipsa loquitur*."

(r) *Dwarkanath v. The Rivers Steam Navigation Co., Ltd.* (1918) 27 Cal. L.J. 615, 20 Bom. L. R. 735 [P.C.]

(s) *Rampal Singh v. Murray & Co.* (1899) 22 All. 164, 167.

person hires a horse for riding in a sound condition and the horse dies the same day while it is in his custody, it is for the hirer to prove that he had taken such care of the horse as a man of ordinary prudence would, under similar circumstances have taken of his own (t). Similarly, where goods delivered for safe custody for reward are lost while in the possession of the bailee, the burden lies on the bailee to prove absence of negligence on his part (u). But where hotel furniture used by a guest while suffering from an infectious disease is destroyed by the hotel-keeper to prevent infection, it lies on the hotel-keeper to prove, to entitle him to damages for the loss thereof, that the guest did not take as much care of the goods as a person of ordinary prudence would have taken of his own goods under similar circumstances (v).

8a.
151, 11

Compare the Transfer of Property Act, s. 76, cl. (a), as to care required of a mortgagee in possession.

Contract by bailee exempting himself from liability for negligence.—A bailee's liability cannot be reduced by contract below the limit prescribed by this section; a contract by a bailee purporting to exempt him wholly from liability for negligence is not valid (w).

Bailee's liability for negligence of servants.—A bailee's liability extends to damage caused by the negligence of his servants acting in the course of their employment about the use or custody of the thing bailed; but it does not extend to damage caused by the acts or defaults of third persons which he could not by ordinary diligence have foreseen and prevented, nor to unauthorised acts of his servants, outside the scope of their employment (x).

152.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

Bailee when not
liable for loss, etc.,
of thing bailed.

(t) *Shields v. Wilkinson* (1887) 9 All. 398, 406. See Evidence Act, s. 106.

(u) *Trustees of the Harbour Madras v. Best & Co.* (1899) 22 Mad. 524.

(v) *Rampal Singh v. Murray & Co.* (1899) 22 All. 164.

(w) *Sheik Mahamad v. The Princes India Steam Navigation Co., Ltd.* (1908) 32 Mad. 95, at p. 120.

(x) *Sanderson v. Collins* [1904] 1 K. B. 628, C. A., overruling *Coupe Co. v. Maddick* [1891] 2 Q. B. 413, so far

l. 152.

Note that by English law, "in an action against a stranger for loss of goods caused by his negligence, the bailee in possession can recover the value of the goods, although he would have had a good answer to an action by the bailor for damages for the loss of the thing bailed." His right is the general right of a lawful possessor against a wrongdoer, and does not at this day depend on his liability to the bailor, whatever may be the true historical view of the mediæval law (y). The bailee's rights against strangers are naturally not specified in the present Act, as they do not differ from the rights of any other lawful possessor, and arise not from the contract of bailment, but from the fact of possession.

Care to be taken by bailee.—Since the standard of diligence required of a bailee is that of the average prudent man, a bailee of goods is not liable for loss of the goods by theft in his shop, if it is shown that he took as much care of the articles bailed as an ordinary prudent man would, under similar circumstances, take of his own goods of the same quality and value (z). For the same reason if A. sends jewels to B. for repairs, asking B. to return them after repair as a value payable parcel, and B. does so, B. is not liable for the loss of the jewels merely because he failed to insure the parcel. Failure to insure the jewels is not evidence of want of such care as a man of ordinary prudence would, under similar circumstances, take of his own goods, especially when the owner himself does not insure them when sending them out for repair (a).

The bailee's duty does not necessarily come to an end when the goods are lost or stolen. In England a bailee for reward ought to take such steps, if any, as are reasonable and usual with a view to recovering the goods. If he fails to do so, the burden of proof is on him to show that reasonable efforts would not have been successful (b).

as it purports to lay down any different rule of law. *Cp. Ulsten v. Nicols* [1894] 1 Q. B. 92, as illustrating the ways in which such questions may arise.

(y) *The "Winkfield"* [1902] P. 42, C. A., overruling *Claridge v. South Staffordshire Tramway Co.* [1892] 1 Q. B. 42, 54, 59. Both the arguments and the judgment of Collins, M. R., con-

tain much valuable historical discussion, which, however, we must not dwell upon here.

(z) *Lakhmi Das v. Babu Megh* (1900) Punj. Rec. no. 90.

(a) *Boseck & Co. v. Maudleston* (1906) Punj. Rec. no. 70.

(b) *Coldman v. Hill* [1919] 1 K. B. 443.

- 153.**—A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. Ss. 153, 154.
- Termination of bailment by bailee's act inconsistent with conditions.

Illustration.

A. lets to B., for hire, a horse for his own riding. B. drives the horse in his carriage. This is, at the option of A., a termination of the bailment.

It is well-settled law that a wrongful use or disposal of the goods by the bailee determines the bailment and remits the bailor to the rights and remedies of a person entitled to possession; a wrongful act means, for this purpose, a dealing wholly inconsistent with the terms of the bailment. The English authorities go into refinements as to the precise kind of wrong committed and the precise form of action available which are almost as subtle as anything in either European or Hindu philosophy; but, as these are intimately connected with the old common law system of pleading, we have no occasion to consider them here (c). Merely irregular exercise of a right, such as a sub-pledge to a third person by a pledgee, or a premature sale by a pledgee with power of sale, has not the same effect (d). The present section has the merit of simplicity, and does not appear to have given rise to any litigation.

- 154.**—If the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.
- Liability of bailee making unauthorised use of goods bailed.

Illustrations.

(a) A. lends a horse to B. for his own riding only. B. allows C., a member of his family, to ride the horse. C. rides with care, but the horse accidentally falls and is injured. B. is liable to make compensation to A. for the injury done to the horse. [See 1 Sm. L. C. 197].

(c) *Cooper v. Willomatt* (1845) 1 C. B. 672; 68 R. R. 798; *Fenn v. Bittleston* (1851) 7 Ex. 152; *Donald v. Suckling* (1866) L. R. 1 Q. B. 585; *Nyberg v. Handelaar* (1892) 2 Q. B. 202, C. A. may be commended to the learned reader desirous of pursuing the subject. And see Pollock on Torts, 10th Ed. 381-384. (d) *Donald v. Suckling*, last note *Halliday v. Holgate* (1868) Ex. Ch., L. R. 3 Ex. 299, 302.

8s.
154, 155.

(b) A. hires a horse in Calcutta from B. expressly to march to Benares. A. rides with due care, but marches to Cuttack instead. The horse accidentally falls and is injured. A. is liable to make compensation to B. for the injury to the horse.

[By the common law this is not only a breach of the contract, but an independent wrong, so that a person who could not be sued on the contract, such as an infant, may be liable : *Burnard v. Haggis* (1863) 14 C. B.N. N. S. 45.]

Illustration (b) is apparently suggested by the case put in old English books of a man borrowing a horse to ride to York and riding to Carlisle. See 1 C. B. 681 ; 68 R. R. 895. Discussion of the old forms of action being here superfluous, no comment is required.

155.—If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

Effect of mixture, with bailor's consent, of his goods with bailee's.

This and the two following sections are clear enough. In England there is hardly any modern authority. In a case before the Court of Common Pleas in 1868 (e) a ship laden with cotton was wrecked, and part of the cargo lost, and the marks on a large proportion of the bales that were saved were so much obliterated by sea water that no bale could be identified as belonging to any particular consignee. The Court held that all the owners became tenants in common of the cotton which arrived at its destination in the proportion which the quantities respectively shipped by them bore to the whole quantity shipped. It will be observed that there was no question of bailment, nor did the case otherwise resemble any of those dealt with in the present group of sections, which do not mention accidental mixture at all. The Court added, however:—"It has been long settled in our law, that, where goods are mixed so as to become undistinguishable by the wrongful act or default of one owner, he cannot recover, and will not be entitled to his proportion or any part of the property from the other owner." This severe rule, which the Contract Act has not adopted (s. 157, p. 532, below), is advocated on moral grounds. Blackstone says: "Our law, to guard against fraud, gives the entire property, without any account,

(e) *Spence v. Union Marine Insurance Co.*, L. R. 3 C. P. 427, 437, 438.

to him whose original dominion is invaded and endeavoured to be rendered uncertain without his own consent" (f). Similarly Kent, adding, however, the qualification, which corresponds to s. 156 (below), that "this rule is carried no further than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. So, if the corn or flour mixed together were of equal value, then the injured party takes his given quantity and not the whole. This is Lord Eldon's construction of the old law" (g).

Ss.
155, 156

The Contract Act is in substantial agreement with the Roman law (h).

156.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.

Effect of mixture, without bailor's consent, when the goods can be separated.

Illustration.

A. bails 100 bales of cotton marked with a particular mark to B. B., without A.'s consent, mixes the 100 bales with other bales of his own, bearing a different mark. A. is entitled to have his 100 bales returned, and B. is bound to bear all the expense incurred in the separation of the bales and any other incidental damage.

See on s. 155. The proposition is almost too obvious to need stating. Not only this, but any other difficulty caused by unauthorised acts of the bailee which may attend the return of the bailor's

(f) Comm. ii 405. The clumsy locution "endeavoured to be rendered" is a strange exception to the usual elegance of Blackstone's style.

(g) Commentaries on American Law, ii. 365; Lord Eldon's dictum is in *Lupton v. White* (1808) 15 Ves. at p. 442; 10 R. R. at pp. 101, 102. A later reference to this by Stuart, V.-C., in *Cook v. Addison* (1869) L. R. 7 Eq. 466, 470, seems to add a new kind of "confusion"

to the subject by assuming that goods and money are under identical rules. Mixture of funds, as it is called, is a wholly different thing from the *confusio* of corporal goods. Specifically deposited hoards of coin might, of course, get mixed, but such are not the cases that come before modern Courts of Equity. Cp. the note on s. 160, p. 633, below.

(h) I. ii. 1, 27.

8s. goods according to the contract must be at the bailee's risk and
156-158, expense.

157.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

Effect of mixture, without bailor's consent, when the goods cannot be separated.

Illustration.

A. bails a barrel of Cape flour, worth Rs. 45, to B. B., without A.'s consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B. must compensate A. for the loss of his flour.

See on s. 155. By the Trusts Act, s. 66, "where the trustee wrongfully mingles the trust property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him."

158.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Repayment by bailor of necessary expenses.

This and the next two sections represent Story's opinion partly of what the law is and partly of what it should be. The latter part of s. 159 is in substantial accordance with an opinion of Paulus in the Digest (13, 6, 17, §3). One does not quite see why in our law the bailee's promise may not be limited to returning the goods at a certain date or on demand after a certain date, if such is the agreement of the parties. The bailor may intend to accept a promise so qualified as the consideration for parting with the possession of the goods, and there is no known rule of law to prevent effect from being given to that intention. Why not let the parties make their own terms instead of borrowing a fixed rule from a system which has no doctrine of consideration? But the truth is that gratuitous bailments, though

very common in private life, are not matters of business and therefore do not come into court.

Ss.
158-160.

159.—The lender of a thing for use may at any time require its return, if the loan was gratuitous even though he lent it for a specified time or purpose. But, if, on the face of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Restoration of
goods lent
gratuitously.

No authority has been found for Story's view (*i*), which appears, as above stated, to be needlessly complicated. On principle the question is what the terms of the contract were. *Quære* whether an express contract not to recall a thing gratuitously lent before the expiration of a certain time would not be good in British India notwithstanding this section. There is no difficulty about the consideration.

160.—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

Return of goods
bailed, on expira-
tion of time or
accomplishment of
purpose.

Nothing is said here about the extent of the bailor's remedies if the goods are not forthcoming. He can have an action for damages against the bailee, but also he has further equitable rights. "If the bailee sells the goods bailed, the bailor can in equity follow the proceeds, and can follow the proceeds wherever they can be distinguished either being actually kept separate, or being mixed up with other moneys." (*j*).

(i) See Story, Bailments, §258. (1879) 13 Ch. Div. 696, 710.

(j) Jessel, M. R., *Re. Hallett's Estate*

ss.
160-162.

"It has been established for a very long period. . . . that the principles relating to the following of trust property [compare the Trusts Act, ss. 63—65] are equally applicable to the case of a trustee . . . and to the case of factors, bailees, or other kinds of agents. . . . wherever a specific chattel is entrusted by one man to another, either for the purpose of safe custody or for the purpose of being disposed of for the benefit of the person entrusting the chattel; then either the chattel itself, or the proceeds of the chattel, whether the chattel has been rightfully or wrongfully disposed of, may be followed at any time, although either the chattel itself, or the money constituting the proceeds of that chattel, may have been mixed and confounded in a mass of the like material" (*k*). The development of this doctrine in cases of trust is not within our scope; it is connected with the special application and limitation of the rules as to appropriation of payments (s. 61, p. 341, above).

161.—If, by the default of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time (*l*).

Bailee's responsibility when goods are not duly returned.

Conversely, if a bailor or consignee omits or refuses to take his goods at the proper time from a carrier (or, it would seem, any other kind of bailee) who is ready and willing to deliver them, he may be liable to compensate the bailee for any necessary expenses of and incidental to their safe custody (*m*).

162.—A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

Termination of gratuitous bailment by death.

The executors of persons who have borrowed things, especially books, do not always remember this, as is shown by common experience. On the other hand, the executors of a lender may tacitly and

(*k*) Thesiger, L. J., *ib.* at p. 723.

(*l*) As to railway contracts, see the Indian Railways Act IX of 1890, s. 72.

(*m*) *G. N. R. Co. v. Swaffield* (1874) L. R. 9 Ex. 132, following and extending to carriers by land the decision of

the Judicial Committee as to the rights of the master of a ship where a cargo is left on his hands at the port of arrival: *Cargo ex "Argos"* (1872) L. R. 5 P. C. 134.

discreetly, in many cases, treat the loan as a gift without fear of being called to account for a *devastavit*. The problems hence arising, if any, seem to be rather ethical than legal, save so far as the law of limitation cures this amongst other irregularities.

Sa.
162-163

163.—In the absence of any contract to the contrary, the bailor is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Bailor entitled to increase or profit from goods bailed.

Illustration.

A. leaves a cow in the custody of B. to be taken care of. The cow has a calf. B. is bound to deliver the calf as well as the cow to A.

Good sense, and therefore good law, seemingly without any reported authority.

164.—The bailor is responsible to the bailor for any loss which the bailor may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.

Bailor's responsibility to bailor.

If the terms of the bailment are such that its natural determination as between the parties is delivery over to a third person, and there is a paramount title elsewhere, the bailor may be in difficulties, which, however, are mitigated by s. 166.

165.—If several joint owners of goods bail them, the bailor may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

Bailment by several joint owners.

"May," not "must" (n). Even if there is an agreement to the contrary, one of several joint owners cannot, after having accepted redelivery from the bailor, sue him jointly with the other owners; for

(n) *May v. Harvey* (1811) 13 East, R. R. 321, it does not appear what was 197; 12 R.R. 322. In *Broadbent v. the character of the defendant's Ledward* (1839) 11 A. & E. 209; 52 possession.

Ss. 165, 166. "one party to a contract cannot maintain an action for a breach occasioned by his own act, and neither can three parties maintain an action unless each party separately could" (o). Dr. Whitley Stokes charges this section with contradicting all known laws, but *quære* whether he attended sufficiently to the difference made by the enactment being only permissive.

166.—If the bailor has no title to the goods, and the
Bailee not responsible on redelivery to bailor without title.
 bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

Return of goods to or to the order of the bailor.—A bailor who in good faith returns the goods bailed to the bailor or his order is not liable to the true owner of the goods. In a recent Privy Council case (p), N. entrusted certain bales of cotton to L., a *muccadam* (warehouseman). L. pledged the cotton with B. (with whom he had dealings for several years) to secure advances made by B. to L. Subsequently L. redeemed the pledge, and the cotton was returned by B. to or to the order of L. N. sued B. and L. claiming delivery of the goods or their value. It was held that whether the pledge by L. to B. was or was not valid under s. 178, the return of the goods by B. in good faith to L. was a complete defence to the suit. The section really applicable was the present section, but the case was wrongly argued as under s. 178, which it was held unnecessary to consider.

Estoppel of bailee.—Cp. the Evidence Act I of 1872, s. 117.—
 ".....Nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.....*Expl.* 2. If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor."

(o) *Brandon v. Scott* (1857) 7 E. & Thackerseydass (1912) L. R. 40 I.A., 37 B. 334; 110 R. R. 574. Bom. 122.

(p) *Bank of Bombay v. Nandlal*

The rule of the Common Law is that generally a bailee is estopped from denying his bailor's title. He is not only justified in delivering to the bailor or according to his directions, but he is not justified in refusing to deliver to the bailor unless he is under the effective pressure of an adverse claim, and defends upon the right and title and by the authority of the third person so claiming. There must be something equivalent to an eviction by a paramount title, which if it actually took place would of course determine the bailment (*q*). But if the bailor has by his own act, as by mortgaging the thing bailed, made it impossible for the bailee to redeliver to him without being exposed to an action at the suit of a third person, then the bailee is excused (*r*).

But if a man accepts a bailment with notice at the time of an adverse claim, he must stand by the election he has made, and cannot afterwards rely on the adverse title against his bailor (*s*).

A common carrier's position is not quite the same, as he must in any case accept goods offered him for carriage and cannot make inquiries as to the ownership. He may safely deliver in pursuance of his employment until he has notice of an adverse claim, but after notice he would so deliver at his peril, and therefore is justified in delivering to the real owner (*t*).

If a warehouseman, or other such like person having the custody of goods, acknowledges that he holds them at the order of a certain person, he thereby makes himself that person's bailee, and is estopped from denying his title to the same extent as if he had actually accepted delivery from him (*u*).

(*q*) *Biddle v. Bond* (1865) 6 B. & S. 225, approved by C. A. in *Rogers, Sons & Co. v. Lambert & Co.* [1891] 1 Q. B. 318, 325. This doctrine does not extend to a change of title, in other kinds of transactions, by assignment or operation of law: *Kingsman v. Kingsman* (1880) 6 Q. B. Div. 122.

(*r*) *European and Australian Royal Mail Co. v. Royal Mail Steam Packet Co.* (1861) 30 L. J. C. P. 247. This is really the application of a wider prin-

ciple. See ss. 53 and 67, pp. 313, 372, above.

(*s*) *Ex parte Davies* (1881) 19 Ch. Div. 86.

(*t*) *Skeridan v. New Quay Co.* (1858) 4 C. B. N. S. 618, 114 R. R. 873, followed in *Eagleton v. E. I. R. Co.* (1872) 8 B. L. R. 581, 606. The Court of Common Pleas preferred Story's earlier to his later opinion.

(*u*) *Henderson & Co. v. Williams* [1895] 1 Q. B. 521, C.A.

ss.
167, 168.

Right of third
person claiming
goods bailed.

167.—If a person, other than a bailor, claims goods bailed he may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods.

The bailee's protection against conflicting claims appears to be left to the general directions of the Code of Civil Procedure. In England the bailee can take refuge with the Court by interpleading (v).

168.—The finder of goods has no right to sue the owner for compensation for trouble and expense voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and, where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

By the Common Law a person who finds lost goods and holds them with the intention of saving them for the true owner is certainly not a trespasser, and has no higher duties than a bailee (w); but, the service being rendered without request from the owner, he does not seem entitled to any remuneration unless a specific reward has been offered for the return of the goods, and the offer has come to his knowledge (see p. 56, above); and if he cannot claim compensation there is no ground on which he can retain the goods. But it seems the Court would be astute to lay hold of any evidence which might constitute a cause of action for a meritorious finder who had been at substantial pains, and it is possible that in some cases he might have rights analogous to a salvor's (x). It appears to have been a current opinion as late as the seventeenth century that a finder could abandon the goods with impunity (y).

(v) It is sufficient to refer to the judgment of Lindley, L.J., in *Rogers, Sons & Co. v. Lambert & Co.* [1891] 1 Q. B. 318, 327.

(w) *Isaack v. Clark* (1615) 2 Bulstr. at p. 312, fully cited by Sir R. S. Wright in *Pollock and Wright on Possession*

at p. 177.

(x) *Nicholson v. Chapman* (1793) 2 H. Bl. 254; 3 R. R. 374.

(y) *Isaack v. Clark* (1615) 2 Bulstr. at p. 312; *Pollock and Wright on Possession* at p. 177.

The rule of the present section appears to be intended to satisfy natural justice. Presumably the compensation, if no specific reward has been offered and the parties cannot agree, is to be what the Court considers reasonable. If the parties do agree, the owner's promise of reward may be binding under s. 25, sub-s. 2 (p. 188 above). See Story, Bailments, § 121A.

See.
168-170

169.—When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses, upon demand, to pay the lawful charges of the finder, the finder may sell it—

(1) when the thing is in danger of perishing or of losing the greater part of its value, or,

(2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

This section is taken from the New York Draft Civil Code s. 943, where it is stated to be a new provision. It does not appear to have come before the Indian Courts. At common law sale by the finder would be a conversion.

170.—Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

Illustrations.

(a) A. delivers a rough diamond to B., a jeweller, to be cut and polished, which is accordingly done. B. is entitled to retain the stone till he is paid for the services he has rendered.

(b) A. gives cloth to B., a tailor, to make into a coat. B. promises A. to deliver the coat as soon as it is finished, and to give A. three months' credit for the price. B. is not entitled to retain the coat until he is paid.

Principle of Bailee's Lien.—This section expresses the "common law principle that if a man has an article delivered to him,

8. 170. on the improvement of which he has to bestow trouble and expense, he has a right to detain it until his demand is paid " (z).

"Where a bailee has expended his labour and skill in the improvement of a chattel delivered to him, he has a lien for his charge in that respect. Thus the artificer to whom the goods are delivered for the purpose of being worked up into form, or the farrier by whose skill the animal is cured of a disease, or the horse-breaker by whose skill he is rendered manageable, have liens on the chattels in respect of their charges" (a). An agister, who merely takes in an animal to feed it, is not entitled to a lien, as not coming within this principle, for he does not confer any additional value on the thing entrusted to him (b).

Further, where a person does work on goods delivered to him under an entire contract, the fact that the deliveries are at different times does not affect his right to a lien on all goods dealt with under that contract (c). It has accordingly been held by the High Court of Calcutta that where jute was delivered to a pressing company from time to time to be baled, but all under one contract the lien attached to all such goods (d).

Contract to the contrary.—Where there is an express contract to do certain work for a specified sum of money, there is no room for a *quantum meruit* claim. A person, therefore, to whom an organ is delivered for repairs for a certain sum is not entitled to retain it as security for a sum of money claimed not under the contract, but for work done (e). While the special contract is in force there is no other "due remuneration" than the sum expressly contracted for.

(z) Best, C.J., in *Bevan v. Waters* (1828) 3 Car. & P. 520; 33 R. R. 692.

(a) Parke, B., in *Scarfe v. Morgan* (1838) 4 M. & W. 270, 283; 51 R. R. 568, 578.

(b) *Jackson v. Cummins* (1839) 5 M. & W. 342; 52 R. R. 737, *Chanda Mal v. Gonda Singh* (1885) Punj. Rec. no 60. In England an innkeeper has a lien on goods brought into the inn by a guest; this is on the distinct ground that he is bound by law to accept them. See 1

Sm. L. C. 129. As to the peculiar position of a distrainer at common law, who does not acquire possession at all, see *Turner v. Ford* (1846) 15 M. & W. 212; 71 R. R. 624; Pollock and Wright on Possession, 82, 202.

(c) *Chase v. Westmore* (1816) 15 M. and S. 180; 17 R. R. 301.

(d) *Miller v. Nasmyth's Patent Press Co., Ltd.* (1882) 8 Cal. 312.

(e) *Skinner v. Jager* (1883) 6 All 123A

171.—Bankers, factors, wharfingers, attorneys of a High Court and policy-brokers may, in the absence

S. 171

General lien of
bankers, factors,
wharfingers, attor-
neys, and policy-
brokers.

of a contract to the contrary, retain, as a security for a general balance of account, any goods bailed to them ; but no other persons have a right to retain, as a security for such balance, goods bailed to them, unless there is an express contract to that effect.

General as distinct from Particular Lien: Bankers.—This “general lien,” as it is called by way of distinction from the “particular lien” of an artificer for work done by him on the particular goods in question (*f*), was originally established in England, as regards bankers and others, as a proved usage of trade ; but, once being so established, it became part of the law merchant, and as much to be judicially noticed as any other part of the law (*g*). The right does not extend to securities or other valuable property deposited with a banker merely for safe custody or for a special purpose (*h*), and this on the ground that the limited and special purpose must be deemed to imply a contract to the contrary, which seems to account for the absence from the text of any words expressly making an exception in such cases. Where a member of a firm deposited a lease to secure a particular advance to the firm, it was held that the banker had no lien for the general balance due from the firm (*i*). Nor does the lien of a banker extend to title-deeds casually left at the bank after a refusal by him to advance money on them (*j*) ; and where a deed, dealing with two distinct properties, was deposited with a memorandum charging only one of the properties with a specified sum and also the

(*f*) “A general lien is the right to retain the property of another for a general balance of accounts ; but a particular lien is a right to retain it only for a charge on account of labour employed or expenses bestowed upon the identical property detained” ; Kent, Comm. ii 634.

(*g*) *Brandao v. Barnett* (1846) 12 Cl.

& F. 787 ; 69 R. R. 204, per Lord Campbell and Lord Lyndhurst.

(*h*) See *Cuthbert v. Roberts, Lubbock & Co.* [1909] 2 Ch. 226, C.A.

(*i*) *Wolstenholme v. Sheffield Bank* (1886) 54 L. T. 746.

(*j*) *Lucas v. Dorrein* (1817) 7 Taunt 278 ; 18 R. R. 480.

5. 171. general balance due to the banker, it was held that he had no lien on the other property comprised in the deed (k).

But, in order that the general lien may be excluded by a special agreement, whether express or implied from the circumstances, the agreement must be clearly inconsistent with the existence of such a lien (l). Accordingly a deposit of valuables with a banker to secure debts of a customer due to him as banker is subject to the bankers' lien for the customer's general debts to him unless the customer can prove an agreement to give up his general lien (m). Such an agreement may be evidenced, for example, by a memorandum of charge declaring that the deposit is to secure overdrafts not exceeding a named amount. This excludes the banker's lien for any greater amount (n). As to boxes or sealed parcels deposited with a banker for custody without informing him of their contents or making them accessible to him, he has no lien on them even if the customer is in the habit of leaving other securities with the banker against advances (o).

A banker's lien, when it is not excluded by special contract, express or implied, extends to all bills, cheques, and money entrusted or paid to him, and all securities deposited with him, in his character as a banker (p). In the case of money and negotiable securities, the lien is not prejudiced by any defect in the title of the customer, nor by equities of third persons, provided the banker acts honestly and without notice of any defect of title (q). But there is no lien for advances made after notice of a defect in the customer's title (r), or after notice of an assignment of the moneys or securities in the banker's hands (s). And in the case of securities

(k) *Wylde v. Radford* (1864) 33 L. J. Ch. 51.

(l) *Brandao v. Barnett* (1846) 12 Cl. & F. 787; 69 R. R. 204; *Agra Bank's Claim* (1872) L. R. 8 Ch. 41.

(m) *Kunhan v. Bank of Madras* (1895) 19 Mad. 234.

(n) *Re Bewes* (1886) 33 Ch. D. 586.

(o) *Lease v. Martin* (1873) L. R. 17 Eq. 224.

(p) *Misa v. Currie* (1876) 1 App. Cas. 554; *London Chartered Bank v. White*

(1879) 4 App. Cas. 413.

(q) *Bank of New South Wales v. Goulburn Butter Factory* [1902] A.C. 543; *Misa v. Currie*, *supra*; *Brandao v. Barnett* (1846) 12 Cl. & F. 787; 69 R. R. 204.

(r) *Solomons v. Bank of England* (1810) 13 East, 135; 12 R. R. 341; *Locke v. Prescott* (1863) 32 Beav. 261.

(s) *Jeffreys v. Agra Bank* (1886) L. R. 2 Eq. 674.

which are not negotiable, the lien is confined to the rights of the customer herein, and is subject to all equities affecting them at the time when the lien attaches (*t*). S. 171.

Factor.—A factor “is an agent entrusted with the possession of goods for the purpose of sale” (*u*). He may buy and sell either in his own name or in that of the principal, though “he usually sells in his own name, without disclosing that of this principal.” The factor is said to have a “special property” in the goods consigned to him (*v*). Private instructions to sell only in the principal’s name or within fixed limits of price will not make him the less a factor or deprive him of his claim to lien (*w*). The secretaries and treasurers of a company, who have made advances to the company and incurred expenses and made disbursements on behalf of the company in the conduct of its business, are not factors, and are not entitled to any lien on the property of the company in their possession (*x*). Similarly a banian in Calcutta has no lien for a general balance of account in the absence of an express contract to that effect (*y*). Though advances made by a factor for sale confer a lien on him, they do not confer upon him the right to sell *invito dominis*. To claim such a right there must be an agreement either express or to be inferred from the general course of business or from the circumstances attending the particular consignment (*z*).

Conformably to the principle governing all general liens, a factor’s lien, where it exists, applies only to debts due to the factor in that character; it does not extend to “debts which arise prior to the time at which his character of factor commences” (*a*). But it extends to all his lawful claims against the principal as a factor, whether for advances, or remuneration, or for losses or

(*t*) *London and County Bank v. Ratcliffe* (1881) 6 App. Cas. 722.

(*u*) *Cotton, L.J., in Stevens v. Biller* (1883) 25 Ch. Div. 31, 37.

(*v*) *Baring v. Cowie* (1818) 2 B. & Ald. 137, per Abbott, C.J., at p. 143, Holroyd, J., at p. 148; 20 R. R. 383.

(*w*) *Stevens v. Biller* (1883) 25 Ch. Div. 31, 37.

(*x*) *In re Bombay Saw Mills Co.* (1889) 13 Bom. 314, 320.

(*y*) *Peacock v. Baijnath* (1891) 18 Cal. 573; L. R. 18 Ind. Ap. 78.

(*z*) *Jafferbhoy v. Charlesworth* (1893) 17 Bom. 520, 542.

(*a*) *Houghton v. Mathews* (1803) 3 B. & P. 485, 488; 7 R. R. 815, 816.

3. 171. liabilities incurred in the course of his employment in respect of which he is entitled to be indemnified (b).

In order that the lien may attach, the goods must come into the possession, actual or constructive (c), of the factor. If, for instance, a factor accepts bills on the faith of a consignment of goods which, by reason of the bankruptcy of the principal, are never received by him, he has no lien on the goods as against the principal's trustee in bankruptcy (d). Nor does the lien extend to goods acquired otherwise than in his character of a factor (e), or entrusted to him with express directions or for a special purpose inconsistent with the existence of a general lien (f). Instructions to provide, out of the proceeds of a consignment, for a bill of exchange drawn by the principal on the factor in favour of a third person will exclude the factor's general lien unless he pays the bill of exchange (g).

Wharfingers.—The lien of a wharfinger is, generally speaking, only effective as regards claims against the owner of the goods. He has no lien as against a buyer for charges becoming due from the seller after he has had notice of the sale (h); and where it was agreed between a buyer and seller, before the goods sold came to the hands of the wharfinger, that the contract of sale should be rescinded, it was held that he had no lien as against the seller for a general balance due to him from the buyer (i).

(b) *Hammonds v. Barclay* (1802) 2 East, 227, where the principal died during the currency of certain bills accepted by the factor on the faith of a consignment of goods; *Drinkwater v. Goodwin* (1775) Cowp. 251 (liability incurred by the factor as surety for the principal).

(c) *Bryans v. Nix* (1830) 4 M. & W. 775; 51 R. R. 829. And see *Lutscher v. Compsoir d'Escompte* (1876) 1 Q. B. D. 709.

(d) *Kinloch v. Craig* (1790) 3 T. R. 119, 783; 1 R. R. 664.

(e) *Dixon v. Stansfeld* (1850) 10 C. B. 398; 84 R. R. 631 (where a factor insured a ship on the principal's

behalf, it was held that his general lien did not extend to the policy of insurance).

(f) *Spalding v. Ruding* (1843) 6 Beav. 376; 63 R. R. 120 (bill of lading, pledged to factor for specific amount); *Burn v. Brown* (1817) 2 Stark. 272; 19 R. R. 719 (certificate of ship's registry entrusted to factor for the purpose of paying duties at custom-house).

(g) *Frith v. Forbes* (1862) 4 De G. F. & J. 409; *Colvin v. Hartwell* (1837) 5 Cl. & F. 484.

(h) *Barry v. Longmore* (1840) 12 A. & E. 639; 54 R. R. 654.

(i) *Richardson v. Goss* (1802) 3 B. and P. 119; 6 R. R. 727.

Owners of a screwhouse who have a wharf as an accessory are not wharfingers (j).

Attorneys.—In England a solicitor has a lien on his client's documents (not only deeds and law papers) (k) entrusted to him as solicitor (l) "for all taxable costs, charges, and expenses incurred by him as solicitor for his client; but he has no lien for ordinary advances or loans. His taxable costs, charges, and expenses would include money payments which he makes for his client in the course of his business, such as counsel's fees" (m). Taking a special security from the client is not necessarily an abandonment of the general lien, but it will be so if the circumstances are inconsistent with the continuance of the lien, and if the solicitor does not expressly reserve his lien an intention to waive it will generally be inferred, having regard to the solicitor's duty to give his client full information (n).

A solicitor who is discharged by his client holds the papers entrusted to him subject to his lien for costs; and the lien extends also to translations of documents made by the Court's translator at his expense (o). If, however, a solicitor discharges himself (p), he is not, according to English law, entitled to a lien, and the same law applies in India. S. 1 saves usages and customs of trade not inconsistent with the provisions of this Act, and the usage of trade of attorneys sanctioned by English law is not inconsistent with

(j) *Miller v. Nasmyth's Patent Press Co.* (1882) 8 Cal. 312.

(k) *E.g.*, cheques: *General Share Trust Co. v. Chapman* (1876) 1 C.P.D. 771.

(l) *Sheffield v. Eden* (1878) 10 Ch. Div. 291 (solicitor mortgagee has no lien on mortgage deed for costs of mortgage; here the deed is not the client's property at all); *Champervown v. Scott* (1821) 6 Madd. 92; 22 R.R. 248; 13 Enc. Laws of Engl. 2nd ed. 494, *s.v.* *Solicitor*, which see for details of English practice on the subject.

(m) Lindley, L.J., *Re Taylor Stileman, and Underwood* [1891] 1 Ch. 590, 596; "all such claims against the client as the taxing master has to consider,"

per Kay, L.J., at p. 599.

(n) *Ib.* at pp. 597, 601; *Re Douglas Norman & Co.* [1898] 1 Ch. 199. The leading earlier authorities are *Cowell v. Simpson* (1809) 16 Ves. 275; 10 R. R. 181, and *Stevenson v. Blakelock* (1813) 1 M. & S. 535; 14 R. R. 525.

(o) *Bai Kesarbai v. Narianji* (1880) 4 Bom. 353.

(p) An attorney who declines to act further for a client unless costs already incurred are paid discharges himself: *Basanta Kumar v. Kusum Kumar* (1902) 4 C. W. N. 767; *Atool Chandra Mukerjee v. Shoshee Bhusan* (1904) 6 C. W. N. 215.

Ss. 171, 172. this section. Applying this reasoning, it was held by the Calcutta High Court that a dissolution of a firm of solicitors operates as a discharge of the client who employs them, and the attorneys are not entitled to retain the papers until their costs are paid (q).

The kinds of lien dealt with in this Act are as follows:—

- (1) Lien of unpaid vendor of goods (s. 95, p. 502 above);
- (2) Lien of finder of goods (s. 168, p. 638 above);
- (3) Particular lien of bailees (s. 170, p. 639 above);
- (4) General lien of bankers, factors, wharfingers, High Court attorneys, and policy-brokers (s. 171, p. 641 above);
- (5) Lien of pawnees (ss. 173, 174, p. 648 below); and
- (6) Lien of agents (s. 221, p. 721 below);

Some further comments with regard to liens, general and particular, of agents and sub-agents, and to the modes in which such liens may be extinguished or lost, will be found at pp. 721—725 *post*.

As to lien of railway administration, see Railways Act IX of 1890, s. 55.

The sections of the Indian Contract Act relating to lien are not exhaustive, and do not negative the existence of lien in cases not specified therein. On general principles, and in the absence of any direct provision to the contrary, an arbitrator has a lien on his award for the payment of his reasonable charges (r).

Bailments of Pledges.

172.—The bailment of goods as security for payment of a debt or performance of a promise is called “pledge.” The bailor is in this case called the “pawnor.” The bailee is called the “pawnee.”

“Pledge,” “pawnor,” and “pawnee” defined.

(q) *Re McCorkindale* (1880) 6 Cal. 1, following *Re Moss* (1866) L. R. 2 Eq. 345.

(r) *In re Cyril Kirkpatrick* (1897) Act seems to be far-fetched. Punj. Rec. no. 22. The analogy be-

tween a seller of goods and an arbitrator suggested by Roe, C.J., to bring the arbitrator's case within s. 95 of the

The section affirms the Common Law. The bailee under a contract of pledge does not become owner, but, as having possession and right to possess, he is said to have a special property (s). Any kind of goods, documents, or valuable things of a personal nature may be pledged (t). Delivery is necessary to complete a pledge; it may be actual or constructive, and it is sufficient if the thing pledged is delivered under the contract within a reasonable time of the lender's advance being made (u). Government promissory notes may be pledged, but this must be done as required by statute by endorsement and delivery (v). The rules of delivery and the like which are generally applicable to bailments are applicable here. A pawnee may redeliver the goods to the pawner for a limited purpose without thereby losing his rights under the contract of pledge, as for the purpose of enabling the pledgor to sell the goods on the pledgee's behalf (w). If the pawner, however, abuses his authority in such a case by selling or pledging afresh on his own account to a third person who gives value in good faith, the pawnee is not entitled to the goods as against that person, who has received possession from an owner lawfully in possession, though using his possession fraudulently (x).

According to mercantile usage found to obtain in the city of Amritsar, if a person leaves goods with another and then borrows money from him, the loan is to be understood to be made on the security of the goods, so that if the loan is not repaid the creditor may sell the goods and appropriate the proceeds of the sale towards his debt (y).

It is clear from the definition of 'bailment' (s. 148 above) that there can be no pledge of goods unless there is an actual delivery of

(s) See per Bown, L.J., *Ex parte Hubbard* (1886) 17 Q. B. Div. at p. 698.

(t) 10 Enc. Laws of Engl. (2nd ed.) 642, citing *Story*.

(u) *Hillon v. Tucker* (1888) 39 Ch. D. 669. This case has been discussed with reference to so-called symbolical delivery at p. 494 above. *Jyoti Prakash v. Mukti Prakash* (1917) 22 Cal. W. N. 297.

(v) *Jyoti Prakash v. Mukti Prakash*

(1917) 22 Cal. W. N. 297. See also *Nerkram v. Bank of Bengal* (1891) 19 Cal. 322, L. R. 19 I.A. 60, a case of pledge of Government securities.

(w) *North-Western Bank v. Poynter, Son & Macdonalds* (1895) A. C. 56.

(x) *Babcock v. Lawson* (1880) 5 Q. B. D. 284.

(y) *Pirithi Mal v. Gopi Nath* (1886) Punj. Rec. no. 34.

Sec. 72-175. the goods. A loan, however, may be secured by a hypothecation of goods. Such a transaction does not require delivery of goods for its validity; nor can it be said to be prohibited by the Contract Act, because the Act contains provisions for Bailments of Pledges and none for hypothecation of goods (z).

173.—The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

Pawnee's right of retainer.

The pawnee makes himself a wrongdoer if he persists in holding the goods after tender of all that is due. In that event his "special property" is determined by his wrongful refusal of a tender properly made, and the pawnor can recover the goods (a).

174.—The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise other than the debt or promise for which they are pledged: but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

Pawnee not to retain for debt or promise other than that for which goods pledged. Presumption in case of subsequent advances.

This section does not appear to need any comment.

175.—The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

Pawnee's right as to extraordinary expenses incurred.

"Receive."—Note that the word is not "retain," as in the two preceding sections, but "receive." A pawnee has, therefore, no right of lien for "extraordinary" expenses, as he has in the case of

(z) *Haripada v. Anath Nath De* Committee per Lord Macnaghten, *Bank of New South Wales v. O'Connor* (1980) 1918) 22 Cal. W. N. 758.

(a) Settled law. See the Judicial 14 App. Ca. 273, 282.

"necessary" expenses (s. 173), but has only a right of action in respect of them. As an example of the expenses contemplated by this section, Dr. Whitley Stokes (in "The Anglo-Indian Codes") suggests "the cost of curing a pawned horse which meets with an injury by accident." There does not appear to be any distinct English authority. See, however, Kent's Commentaries, ii. 579. 84
175, 1

176.—If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale;

Pawnee's right where pawnor makes default.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor.

Pawnee's rights.—The substance of this section is familiar and well-settled English law. It is sufficient to cite one or two modern dicta. "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale" (b). After sale it is the pawnee's ordinary right "to recover the balance of the loan unsatisfied on the sale of the pledge" (c).

Where no time is originally stipulated for payment, it seems that "the debtor is not in default until notice is given by the creditor that he requires payment on a certain day, and that day is

(b) Cotton, L.J., in *Re Morrill* (1886) (c) *Jones v. Marshall* (1889) 24 Q.B. 18 Q. B. Div. 222, 232. D. 269, 271.

- s. 176. past. The debtor is then in default, and is in the same position as if a day for repayment had been fixed in the original contract " (d).

It must be observed that the contract of pledge differs essentially from that of mortgage. A mortgagee does acquire general property in the thing mortgaged, subject to the mortgagor's right to redeem. Foreclosure is a judicial determination of a defaulting mortgagor's right, whereby the mortgagee's property becomes absolute. A pawnee, not being the legal owner, is not entitled to foreclose, but has only power to sell (e); and authorities on mortgage transactions are to be applied to cases of pledge, if at all, only with great caution.

" May sell the thing pledged."—The power conferred on the pledgee under this section to sell the property without reference to the Court does not take away his right to sue the pawnor on the debt or bring a suit for the sale of the property pledged to him (f). There is nothing in the Act to forbid the pawnee from buying the thing pledged at the sale, though he cannot sell to himself. But it has been held by the Judicial Committee that a sale by the pawnee to himself, though unauthorised, does not put an end to the contract of pledge, so as to entitle the pawnor to have back the thing pledged without payment of the debt secured by it (g). From this point of view it would seem that a sale by a pawnee to himself is not an act "inconsistent with the conditions of the bailment" within the meaning of s. 153 (p. 629 above), so as to entitle the pawnor to avoid the contract of pledge at his option, but is on the same footing as a premature sale (see the commentary on that section).

Reasonable notice of sale.—It is not necessary that the notice under this section should state the date, time or place of the

(d) Note to Law Journal report of 27 Mad. 528; *Nim Chaud v. Jogabun. Pigot v. Cubley* (1864) 15 C. B. N. S. 702; 33 L. J. C. P. 134, 136; 137 R. R. 725. *dhu* (1894) 22 Cal. 21; *Jyoti Prakash v. Mukti Prakash* (1917) 22 Cal. W. N. 297.

(e) *Carter v. Wake* (1877) 4 Ch. D. 605.

(g) *Nerkram v. Bank of Bengal* (1891) 19 Cal. 322, 333; L. R. 19 Ind. Ap. 60.

(f) *Mahalinga v. Ganapathi* (1902)

intended sale. A notice by the pledgee to the pawnor that unless the latter redeems the articles pledged within a fortnight, the pledgee will sell them is good notice, though the pledgee may not sell the goods until some days after the expiration of the fortnight (h). 178, 7

Limitation.—The period of limitation for a suit on the loan is that prescribed by the Limitation Act, Sched. II. art. 57, that is, three years from the date of the loan, whether the suit be to recover the original amount of the loan, or to recover the balance after sale of the thing pledged (i). And if the suit be in respect of a promise, the period is three years from the breach of the promise under art. 115 of the same Act. And where the suit is for the sale of the property pledged, the period of limitation is six years from the date of the pledge under art. 120 of that Act (j).

177.—If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

This is supplemental to the foregoing section, and requires no further explanation.

Limitation.—The period for a suit against a pawnee to recover the thing pledged is thirty years from the date of the pawn. See Limitation Act Sch. I. art. 145.

(h) *Kunj Behari Lal v. Bhargava Commercial Bank* (1918) 40 All. 522.

(i) *Saiyid Ali Khan v. Debi Prasad* (1901) 24 All. 251; *Yellappa v. Desayappa* (1906) 30 Bom. 218; *Dowlat Ram v. Jiwan Mal* (1881) Punj. Rec. no. 116.

(j) *Mahalinga Nadar v. Ganapathi*

Subbien (1904) 27 Mad. 528, per Subrahmaniam Ayyar and Benson, J.J. Davies, J., dissented, holding that art. 67 applied, on the ground that the right to proceed against the property pledged was merely auxiliary to the right to proceed against the debtor personally.

178. **178.**—A person who is in possession of any goods, or of any bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, or warrant or order for delivery, or any other document of title to goods, may make a valid pledge of such goods or documents: Provided that the pawnee acts in good faith and under circumstances which are not such as to raise a reasonable presumption that the pawnor is acting improperly;

Provided also that such goods or documents have not been obtained from the lawful owner or from any person in lawful custody of them, by means of an offence or fraud.

The objects of this section are similar to those of s. 108 (p. 532, above), with which it should be read.

Indian Factors Acts.—The law in force in British India before this section was enacted was contained in the Indian Factors Acts XIII of 1840 and XX of 1844, the first of which extended to British India the provisions of 4 Geo. IV. c. 83 as amended by 6 Geo. IV. c. 94, and the second those of 5 & 6 Vict. c. 39. The Indian Factors Acts are now repealed by the Contract Act. In a recent case the Judicial Committee said: "Sees. 108 and 178, though they very possibly extend, at least cover the same ground as the provisions of the Indian Act XX of 1844" (*k*).

Character of Pledgor's Possession.—It will be noted that the two expressions "by the consent of the owner" and "notwithstanding any instructions of the owner to the contrary" which occur in Exception 1 to s. 108 (p. 532, above) do not occur here. They are not used, and could not have been used, in the third exception to s. 108, for possession under a voidable contract, for which provision is made in that exception, implies absence of free consent and of all instructions from the lawful owner where such a contract is one of sale. The absence, therefore, of those expressions has no bearing on the present section, and does not warrant any inference that "possession" in this

(*k*) *Ramdas v. S. Amerchand & Co.* Bom. 630, 634.

(1916) L. R. 43 I.A. 164, 168-169, 40

section is used in any different sense. It has thus been held that, to create a valid pledge under this section, the pledgor must be in juridical possession of the goods as distinguished from bare custody; so that a servant entrusted by his master with the custody of goods during his absence (*l*), or a wife in charge of her husband's articles of jewellery as custodian on his behalf (*m*), or a person who has hired a jewel for use from its owner (*n*), cannot make a valid pledge thereof under this section. But a commission agent employed to sell a jewel may make a valid pledge of it (*o*). The Punjab Chief Court has held that a person who is in possession of a bicycle under the hire-purchase system and who has not made default in payment of instalments of hire may make a valid pledge of the bicycle. The decision rests mainly on the absence in this section of the words "notwithstanding any instructions of the owner to the contrary" which occur in s. 108 (*p*). Here there is "juridical possession" certainly, and the terms of the Act make it at least difficult to hold otherwise, whatever its framers may have intended.

The possession again must not have been acquired "by means of an offence or fraud." The use of the term "fraud" in juxtaposition to "offence" would seem to indicate that it is confined to the substantive wrong of deceit. The question, however, may arise whether possession obtained under a contract voidable on the ground of fraud is not obtained "by means of fraud" within the meaning of this section. In considering this question it is important to remember that there is no provision here for the rights of third persons acquired before the rescission of such a contract. If the question therefore be answered in the affirmative, it follows that a person in possession of goods under a contract voidable on the ground of fraud cannot create a valid pledge at all, though the pledge might have been made before the rescission of the contract. This would

(*l*) *Biddomoye Dabee v. Sittaram* a case; yet the hirer surely has possession and not bare custody. The language of the Act seems incautiously wide.

(*m*) *Seager v. Hukma Kessa* (1900) 24 Bom. 458.

(*n*) *Naganada v. Bappu* (1903) 27 Mad. 424. The hiring was for four days: it is impossible to hold that the Act meant to authorise a pledge in such

(*o*) *Seshappier v. Subramania* (1917) 40 Mad. 678.

(*p*) *Abdul Hasan Khan v. Rangi Lal* (1902) Puni. Rec. no. 34.

178. leave an out-and-out sale⁵ valid, under s. 108, in some cases where a pledge of the same goods by the same person would, according to the supposed construction of the present section, be invalid. For a person in possession of goods under a contract voidable on the ground of fraud can transfer full ownership, at any time before the contract is rescinded, to a buyer in good faith. It seems difficult to believe that this result was intended by the framers of the Act; and, moreover, it would involve a striking departure from the principles of the Common Law, which, if intended, we should expect to find more clearly expressed.

If the intention was not to alter the law, then the obtaining of goods or documents by fraud of which the proviso speaks must mean obtaining possession by such a trick or fraud as excludes real consent, and therefore cannot be the foundation of any contract. In such a case there is no real delivery (see on ss. 10 and 13, pp. 64, 81 above). But it must be allowed that the true meaning of the proviso is not free from obscurity. It seems to be the better opinion that a valid pledge may be made where the possession is obtained under a *voidable contract*, whether it be on the ground of coercion, undue influence, misrepresentation, or even fraud not amounting to cheating; but that the pledge must be made before the contract is rescinded.

The possession of a trustee for a minor, who is allowed to remain in possession by the minor after he has attained majority, is not possession acquired by means of an offence or fraud. A pledge by the trustee of property belonging to the minor and in his possession is therefore valid under this section (g).

Antecedent Debt.—Under the English Factors Act of 1842, a pledge by an agent entrusted with the possession of goods to secure an “antecedent debt” did not come within the protection of the Act; and the same law was extended to this country by the Indian Factors Act XX of 1844. The present section seems to protect a pledge for an antecedent debt as well as a pledge for an advance made specifically upon it.

(g) *Sundar Deo v. Bhagwan Das* (1908) 30 All. 165.

Good Faith, etc.—To validate a pledge under the Indian Factors Act of 1844 it was necessary that the loan should be made *bonâ fide* and without notice that the agent pledging the goods had no authority to pledge the goods. It was accordingly held in a case (r) decided under that Act that, to establish such notice on the part of the pledgee, it was sufficient to show that the circumstances attending the transaction were such as that a reasonable man of business, applying his understanding to them, would certainly know that the agent had not authority to make the pledge, even if the agent was not also acting *malâ fide* towards his principals. Ss.
178, 179

Where a person authorised to sell, indorse, and assign Government promissory notes borrowed moneys from a bank on the security of the notes, which he deposited with the bank, it was held that the owner of the notes could not recover them in detinue against the bank (s).

Pledge by a co-owner in possession.—One of several joint owners of goods in sole possession thereof, with the consent of the rest, may make a valid pledge of the goods (t). Compare s. 108, Exception 2, p. 533 above.

Competition between prior mortgagee and subsequent pledgee.—A. mortgages certain goods to B., the mortgage not being accompanied with possession (u). Afterwards A. pledges the goods with C. The pledge to C. is not invalid, and C. has a priority over B. (v).

"Any other document of title to goods".—Share certificates are not documents of title to goods within the meaning of this section (w). See notes to s. 103 under the heads "goods" and "other instrument of title to any goods", p. 524 above.

179.—Where a person pledges goods in which he has

Pledge where pawnor has only a limited interest. only a limited interest, the pledge is valid to the extent of that interest.

(r) *Gobind Chunder Sein v. Ryan* (1861) 9 M. I. A. 140; 1 W. R. 43, P.C. See also *Jonmenjoy v. Watson* (1884) 10 Cal. 901; L. R. 11 Ind. Ap. 94.

(s) *Bank of Bengal v. Macleod* (1849) 5 M. I. A. 1.

(t) *Shadi Ram v. Mahtab Chand* (1895) Punj. Rec. no. 1.

(u) A mortgage of movable property

although not accompanied by possession, is valid in India; *Shrish Chandra Roy v. Munzri Bewa* (1904) 9 C. W. N. 14; *Damodar v. Atmaram* (1906) 8 Bom. L.R. 344.

(v) *Chummun Khan v. Mody* (1874) Punj. Rec. no. 70.

(w) *Lalit Mohan v. Haridas* (1916) 24 Cal. L. J. 335.

178, 180.

This must be taken as subject to the operation of the foregoing section. In those cases where a pledge which otherwise would not be valid is made valid by s. 178, it does not matter whether the pawnor has any interest of his own or not. The present section applies to other cases where the pawnor has possession and some interest, but not the whole interest, in the goods; and where it applies, it is immaterial that the pawnee had not notice of the pawnor's limited interest (x).^{*} Probably it does not apply to a case in which he is not entitled to possess the thing in his own right, but has obtained or been entrusted with possession for some special and limited purpose, and pledges the thing for his own purposes (y). In such a case the attempted pledge is, according to English authority wholly inoperative, and then the pawnee has no defence against an action by the person having the better title to possess. The true scope of the section has been thus defined by Scott, C.J., "Section 179 does not limit the scope of section 178, but saves a pledge to the extent of the pledgee's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to s. 178. In other words, whenever he has an interest, the person in possession of the goods or documents has unconditional authority to charge at least that interest" (z).

Suits by Bailees or Bailors against Wrong-doers.

180.—If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Suit by bailor
or bailee against
wrong-doer.

Under the old common law procedure a bailor could not bring an action of trespass, trover, or detinue (these actions being founded either on actual possession or on the immediate right to possess),

(x) Long settled law: *Hoare v. Parker* Q.B. 202; and see note (n), p. 653 above. (1788) 2 T.R. 376; 1 R.R. 500.

(z) *Lakhamsey Latha & Co. v.*

(y) *Nyberg v. Handelslaar* [1892] 2 *Lakmichand* (1918) 42 Bom. 205.

unless the bailment was revocable at his pleasure either unconditionally or on a condition which he might satisfy at will (a). An owner not entitled to immediate possession could have only a special action on the case (b). The bailee could and can always sue a wrong-doer; and his right does not, as once supposed by some authorities, depend on his being answerable over to the bailor (c). The distinctions which turn merely on the form of action available have ceased to be important in England, and were never generally applicable in India.

Sa. ...
180-181

The section is hardly likely to present any difficulty in practice. A. leaves an elephant in charge of B. C. wrongfully takes away the elephant from B. B. may sue C. for possession of the elephant (d).

181.—Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

Apportionment
of relief or com-
pensation obtained
by such suits.

In other words, it does not matter which of them recovers first, or whether one sues or both. Of course the defendant cannot be liable in all for more than the value of the goods, and special damages, if any.

CHAPTER X.

AGENCY.

[In the commentary on this chapter "Story on Agency" is referred to as S. A.].

Appointment and Authority of Agents.

182.—An "agent" is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the "principal."

(a) Sir R. S. Wright in Pollock and Wright on Possession, 166.

(b) *Mears v. L. & S.-W.R.* (1862) 11 C. B. N. S. 850; 132 R. R. 778.

(c) *The "Winkfield"* [1902] P. 42 C.A.

(d) *Ramnath v. Pitambar* (1916) 43 Cal. 733, 741-742.

182. **Nature of Agency in General.**—The law stated in the introductory group of sections (182-189) under this heading is too elementary to need much exposition. The essential point about an agent's position is his power of making the principal answerable to third persons. A person does not become an agent on behalf of another merely because he gives him advice in matters of business (e).

Agency sometimes has to be distinguished from facts more or less resembling it.

The legal relation between a merchant in one country and a commission agent in another is that of principal and agent, and not seller and buyer, though this is consistent with the agent and principal, when the agent consigns the goods to the principal, being in a relation like that of seller and buyer for some purposes (f). A merchant, therefore, in this country who orders out goods through a firm of commission agents in Europe cannot hold the firm liable as if they were vendors for failure to deliver the goods. And the result is the same if the goods are ordered out through a branch in this country of a firm of commission agents in another country (g). For the same reason, where a commission agent buys goods for a merchant at a price smaller than the limit specified in the indent, he cannot charge any price higher than that actually paid by him (h), except in the case of a custom to the contrary (i). See notes to s. 211, below.

An agent may have, and often has in fact, a large discretion, but he is bound in law to follow the principal's instructions provided they do not involve anything unlawful. To this extent an agent may be considered as a superior kind of servant; and a servant who is entrusted with any dealing with third persons on his

(e) *Mohesh Chandra Bosa v. Radha Kishore Bhattacharjee* (1908) 12 C. W. N. 28, 32.

(f) *Ireland v. Livingstone* (1872) L. R. 5 H. L. 395; *Cassaboglou v. Gibb* (1883) 11 Q. B. Div. 797; *cp. p. 511, above.*

(g) *Mahomedally v. Schiller* (1889) 13 Bom. 470. The order to the defendants in this case was in the following

form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below."

(h) *Shaw v. Baij Nath* (1897) *Punj. Rec. no. 21.*

(i) See *Paul Beier v. Chotalal Javerdas* (1906) 30 Bom. 1, cited in notes to s. 211, p. 700 below.

master's behalf is to that extent an agent. But a servant may be wholly without authority to do anything as an agent, and agency, in the case of partners, even an extensive agency, may exist without any contract of hiring and service. S. 182.

Del credere Agent.—A *del credere* agent is one who, in consideration of extra remuneration, called a *del credere* commission, undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties (j). A *del credere* agency may be inferred from a course of dealing between the principal and agent showing that extra remuneration was charged for the risk of bad debts (k). A *del credere* agent incurs only a secondary liability towards the principal; he is in effect a surety for the persons with whom he deals, to the extent of any default by insolvency or something equivalent, but not to the extent of a refusal to pay based on a substantial dispute as to the amount due (j).

It is sometimes difficult to decide whether a consignee of goods for sale is a *del credere* agent or buyer, where he is permitted to sell at such prices and on such terms as he thinks fit, and allowed to retain any profits over and above an agreed price, the payment of which he guarantees to the principal (l).

Co-agents.—Two or more persons may be employed to act as agents jointly, or severally, or jointly and severally. In the absence of circumstances indicating an intention to the contrary, an authority given to two or more persons is presumed to be given to them jointly and not severally, and in such case it is necessary that they should all concur in the execution of the authority in order to bind

(j) *Morris v. Clesby* (1816) 4 M. & S. 566; 14 R.R. 531; *Hornby v. Lacy* (1817) 6 M. & S. 166; 18 R. R. 345; *Thomas Gabriel and Sons v. Churchill and Sim* [1914] 3 K. B. 1272, C.A. In England this has not the effect of bringing his contract within the Statute of Frauds, as it is essentially different from a guarantee: *Couturier v. Hastie* (1852) 8 Ex. 40; 96 R. R. 584; *Sutton v. Grey* [1894] 1 Q. B. 235.

(k) *Shaw v. Woodcock* (1827) 7 B. & C. 73; 31 R. R. 158.

(l) Compare *Ex parte White*, in *re Nevill* (1870) L. R. 6 Ch. 397, with *Ex parte Bright*, in *re Smith* (1879) 10 Ch. Div. 566. And see *Livingstone v. Ross* [1901] A. C. 327.

84. the principal (*m*), unless it is provided that a certain number of
 182-185. them shall form a quorum (*n*). There is, however, an exception to this rule where the authority conferred is of a public nature. In such a case, if all the persons in whom the authority is vested meet for the purpose of exercising it, the act of the majority is considered that of the whole body (*o*). Where authority is given to co-agents severally, or jointly and severally, any one or more of them may exercise it so as to bind the principal without the concurrence of the other or others (*p*).

183.—Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

184.—As between the principal and third persons any person may become an agent; but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principal according to the provisions in that behalf herein contained.

As between the principal and third persons, the act of an agent is looked upon as the act of the principal who authorised it. Hence the rule that a person who has no capacity, or only a limited capacity, to contract on his own behalf is competent to contract so as to bind his principal. In pursuance of this rule it has been held that the fact of an agent being unable to read or write constituted no ground for the avoidance by the principal of a written contract made by the agent on his behalf (*q*).

185.—No consideration is necessary to create an agency.

(*m*) *Brown v. Andrew* (1849) 18 L. J. Q. B. 153; 83 R. R. 842; *In re Liverpool Household Stores* (1890) 59 L. J. Ch. 616.
 (*n*) See *Ridley v. Plymouth Grind- ing Co.* (1848) 2 Ex. 711; 76 R. R. 742; *Kirk v. Bell* (1850) 16 Q. B. 290; 83 R. R. 456; *D'Arcy v. Tamar Rail Co.*

(1866) L. R. 2 Ex. 158.
 (*o*) *Grindley v. Barker* (1798) 1 B. & P. 229; 4 R. R. 787.
 (*p*) *Guthrie v. Armstrong* (1822) 5 B. & Ald. 628.
 (*q*) *Foreman v. Great Western Ry Co.* (1878) 38 L. T. 851.

By the common law no consideration is required to give a man the authority of an agent, nor to make him liable to the principal for negligence in that which he has already set about, for such liability, though it may be defined by the terms of a contract, is in its nature independent of contract; but a merely gratuitous employment or authority does not bind the agent to do anything; and if, having neither reward nor promise of reward, he does nothing at all, the principal does not appear to have any remedy. But this distinction is of little practical importance, if any.

185-187.

Agent's authority may be expressed or implied.

186.—The authority of an agent may be expressed or implied.

Express Authority.—See particularly Registration Act III of 1877, s. 32 (agent for registration); and Code of Civil Procedure, s. 39 (appointment of pleader) (r).

187.—An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

Definitions of express and implied authority.

Illustration.

A. owns a shop in Serampur, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B., and he is in the habit of ordering goods from C. in the name of A. for the purposes of the shop, and of paying for them out of A.'s funds with A.'s knowledge. B. has an implied authority from A. to order goods from C. in the name of A. for the purposes of the shop.

Implied Authority.—It is needless to cite authorities to show that the ordinary course of affairs must be regarded in order to ascertain the extent of an authority not defined except by the general nature of the business to be done. "A person who employs a broker must be supposed to give him authority to act as other brokers do" (s). It might be difficult, but happily there is

(r) Code of 1908, O. 3, r. 4.

& E. 27; 50 R. R. 312, per Littledale, J.

(s) *Sutton v. Tatham* (1839) 10 Ad.

- S. 187.** no need, to draw a clear line between cases falling under the latter part of this section and those falling under the second paragraph of s. 188. As to the saving of usages of trade under this Act, see on s. 1, p. 11, above.

A power of attorney authorising the holder "to dispose of" certain property in any way he thinks fit does not imply an authority to mortgage the property (*t*). Nor does a power of attorney to an agent to carry on the ordinary business of a mercantile firm imply an authority to draw or indorse bills and notes (*u*). Authority on dissolution of partnership to settle the partnership affairs does not authorise the drawing, accepting, or indorsing of bills of exchange in the name of the firm (*v*). Where the principal carries on a general money-lending business, the authority to the agent to borrow implies an authority to pledge the principal's credit for the purpose of obtaining or securing advances from others to customers (*w*).

Husband and Wife.—This is a special and important case of implied authority. "The liability of a husband for a wife's debts depends on the principles of agency, and the husband can only be liable when it is shown that he has expressly or impliedly sanctioned what the wife has done" (*x*). "Thus a person dealing with a wife and seeking to charge her husband must show either that the wife is living with her husband and managing the household affairs, in which case an implied agency to buy necessaries is presumed (*y*), or he must show the existence of such a state of things as would warrant her in living apart from her husband and claiming support or maintenance, when, of course, the law would give her an implied authority to bind him for necessaries supplied to her during such separation in the event of his not providing

(*t*) *Malukchand v. Sham Moghan* (1890) 14 Bom. 590; *Bank of Bengal v. Fagan* (1849) 5 M. I. A. 27, 41.

(*u*) *Pestonji v. Gool Mahomed* (1874) 7 M.H.C. 369. See Negotiable Instruments Act, 1881, s. 27.

(*v*) *Abel v. Sutton* (1800) 3 Esp. 108; 6 R.R. 818.

(*w*) *Bank of Bengal v. Ramanathan* (1916) L. R. 43 I.A. 48, 54, 23 Cal. L. J. 348, 356.

(*x*) *Girdhari Lal v. Crawford* (1885) 9 All. 147, 155.

(*y*) Not conclusively: *Debenham v. Mellon* (1880) 6 App. Ca. 24.

her with maintenance" (z). Where a European husband and wife, therefore, lived together, it was held that the husband was not liable for moneys borrowed by the wife to pay her previous debts, and not for the purpose of any household or necessary expenses (a). Similarly, a European husband is not liable for the price of goods supplied to his wife, where the husband was remitting to her sums amply sufficient for her maintenance and had expressly forbidden his wife to pledge his credit, and, further, the wife kept a boarding school and was in receipt of payments made by the parents of children boarding with her (b). Much the same principles apply to Hindus. A Hindu wife living separate from her husband because of his marriage with a second wife has no implied authority to borrow money for her support, as the second marriage does not justify separation (c). But when a woman governed by the provisions of the Married Women's Property Act III of 1874 has separate property of her own (d), the presumption would be that she was not pledging her husband's credit. A European wife subject to the last-mentioned Act carried on the business of a milliner, and the husband had no concern in it; it was held that he was not liable for debts contracted by the wife in the management of that business (e). But, whatever be the law to which the parties are subject, it is clear that there can be no presumption of agency where moneys are borrowed by a woman in her own right as heir to her husband under the belief that the husband is dead. In such a case the lender must be taken to have dealt with the woman in her own right, "and not looking in any way to the husband as responsible for the debt" (f).

It is now settled in England that "the question whether a wife has authority to pledge her husband's credit is to be treated as one of fact, upon the circumstances of each particular case,

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| <p>(z) <i>Virasvami v. Appasvami</i> (1863) 1 M. H. C. 375. The authority of necessity, where it exists, is altogether independent of contract.</p> <p>(a) See note (z) above.</p> <p>(b) <i>Mahomed Sultan Sahib v. Horace Robineon</i> (1907) 30 Mad. 543.</p> <p>(c) See note (z), above. See also</p> | <p><i>Nathubhai v. Jawher</i> (1876) 1 Bom. 121, 122.</p> <p>(d) See notes on s. 11, p. 78, <i>ante</i>.</p> <p>(e) <i>Allumuddy v. Braham</i> (1878) 4 Cal. 140.</p> <p>(f) <i>Puri v. Mahadeo Prasad</i> (1880) 3 All. 122.</p> |
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86.
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whatever may be the presumption arising from any particular state of circumstances" (g), such as the presumption from a man and his wife living together in the ordinary way "that he entrusts her with such authorities as are commonly and ordinarily given by husband and wife" (h), including authority to pledge his credit to a reasonable extent and in a reasonable manner for ordinary household expenses. Where such authority exists, it can be revoked; or its existence may be negatived by the husband supplying the wife with an adequate allowance of ready money (i). And a person with whom the wife deals is entitled to notice of her authority being revoked only if the husband has in some way, as by paying previous accounts, given him reason to believe that the wife's transactions were authorised (j).

188.—An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act.

Extent of agent's authority.

An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business.

Illustrations.

(a) A. is employed by B., residing in London, to recover at Bombay a debt due to B. A. may adopt any legal process necessary for the purpose of recovering the debt, and may give a valid discharge for the same.

(b) A. constitutes B. his agent to carry on his business of a ship-builder. B. may purchase timber and other materials, and hire workmen for the purposes of carrying on the business.

Extent of Authority.—It is well settled that an agent's authority is, in Story's words (§ 58), "construed to include all the

(g) *Debenham v. Mellon*, 6 App. Ca. at p. 31 (Lord Selborne).

(h) *Debenham v. Mellon*, 6 App. Ca. at p. 36. (Lord Blackburn).

(i) *Ib.*; *Morel Brothers & Co. v. Earl of Westmoreland* [1903] 1 K. B. 64, C.A.

(j) *Debenham v. Mellon*, where earl-

ier authorities may be found collected; and see the notes to *Manby v. Scott* in 2 Sm. L. C., and 6 Encycl. Laws of Engl. 2nd ed. 675—679. The later case of *Paquin v. Beauclerk* [1906] A. C. 148, proceeds on the special construction of an English statute.

necessary and usual means of executing it." If its terms are ambiguous, the principal will be hold bound by that sense in which the agent reasonably understood and acted upon them (*k*). Further an authority is generally construed in case of doubt according to the usual course of dealing in the business to which it relates (*l*), partly because this may be presumed to have been really intended, and partly because third persons may reasonably attribute to an agent such authority as agents in the like business usually have. This last reason has been extended to holding an undisclosed principal liable for a purchase on credit which he had expressly forbidden the agent to make (*m*). As in the case of an undisclosed principal there can be no apparent authority, and in fact there was no real authority, the correctness of this decision is doubtful (*n*). It rather seems that the rule applies only where credit is given not to the agent alone, but to the principal or firm which he apparently represents (*o*).

The following are illustrations from the English authorities of the rule stated in the first paragraph of the section. An agent employed to get a bill discounted has authority to warrant it a good bill, but not to indorse it in the principal's name (*p*). If employed to find a purchaser for property, he has authority to describe the property, and state any circumstances which may

(*k*) *Ireland v. Livingstone* (1872) L. R. 5 H. A. 395.

(*l*) *E.g., Pole v. Leask* (1860) 28 Beav. 562. But an agent entrusted with goods for sale by a person who does not trade in such goods has no implied authority to bind his principal by a warranty: *Brady v. Todd* (1861) 9 C. B. N. S. 592.

(*m*) *Watteau v. Fenwick* [1891] 1 Q. B. 346.

(*n*) It is not approved by Lord Lindley, *Partnership*, 134, note, and see L. Q. R. ix 111. Mr. Floyd R. Mechem in *Harv. Law R.* xxiii. 601 admits that *Watteau v. Fenwick* "can clearly not be sustained upon the ordinary principles of estoppel," but supports it on the ground of holding out or "putting forward" an

"ostensible principal."

But surely an "ostensible principal" is not "put forward" by any one. If there is no ostoppel there can be no holding out. The case has been followed on similar facts in *Kinahan & Co. v. Parry* [1910] 2 K. B. 380, but only as binding on a court of co-ordinate jurisdiction; and it is still doubtful whether it will ultimately be supported as of general application; the trade there in question has many peculiarities in England.

(*o*) This condition was satisfied in *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97, which *Watteau v. Fenwick* professed to follow.

(*p*) *Fenn v. Harrison* (1791) 3 T.R. 757; 4 T.R. 177.

- §. 188. affect its value, to a proposed purchaser (q). Authority to sell a horse implies authority to warrant it, if the principal is a horse-dealer (r), or the sale is at a fair or public market (s), but not if the principal is unaccustomed to dealing in horses and the sale is a private one (t).

Where an agent is authorised to receive payment of money on his principal's behalf, the payment, in order to bind the principal, must be in cash (u), unless it can be shown that, by a reasonable custom or usage of the particular business in which the agent is employed, payment may be made in some other form; as, for instance, by cheque (v) or bill of exchange (w). A custom for an agent to receive payment by way of set-off or settlement of accounts between himself and the person making the payment is regarded as unreasonable, and is not binding on the principal unless he was aware of it and agreed to be bound by it at the time when he authorised the agent to receive payment (x).

Construction of Powers of Attorney.—A power of attorney is a formal instrument (generally executed under seal in England, but not in India outside the Presidency towns) by which authority is conferred on an agent. Such an instrument is construed strictly, and confers only such authority as is given expressly or by necessary implication (y).

(q) *Mullens v. Miller* (1882) 22 Ch. D. 194.

(r) *Howard v. Sheward* (1866) L. R. 2 C. P. 148.

(s) *Brooks v. Hassall* (1883) 49 L. T. 569.

(t) *Brady v. Todd* (1861) 9 C. B. N. S. 592.

(u) *Pape v. Westacott* [1894] 1 Q. B. 272; *Blumberg v. Life Interests, etc., Corporation* [1898] 1 Ch. 27; *Hine v. S.S. Inv. Syndicate* (1895) 72 L. T. 79 (policy broker no authority to take bill of exchange in payment).

(v) *Bridges v. Garrett* (1870) L. R. 5 C. P. 461.

(w) *Williams v. Evans* (1866) L. R. 1 Q. B. 352 (auctioneer no authority

to take bill of exchange in payment of deposit).

(x) *Underwood v. Nicholls* (1855) 17 C. B. 239; *Pearson v. Scott* (1878) 9 Ch. Div. 198; *Sweeting v. Pearce* (1859) 7 C. B. N. S. 449; 121 R. R. 584 (custom for policy brokers to receive payment from underwriters by way of set-off).

(y) *Bryant v. La Banque du Peuple* [1893] A. C. 170; *Jonmenjoy Coondoo v. Watson* (1834) 9 App. Ca. 561 (a power from time to time to negotiate, make sale, dispose of, assign and transfer gives no authority to pledge) *Cp. Bank of Bengal v. Macleod* (1849) 5 M. I. A. 1; 83 R. R. 1; *Bank of Bengal v. Fagan* (1849) 5 M. I. A. 27; 83 R. R.

One of the most important rules for the construction of a power of attorney is that regard must be had to the recitals which, as showing the scope and object of the power, will control all general terms in the operative part of the instrument. Thus, where it was recited that the principal was going abroad, and the operative part gave authority in general terms, it was held that the authority continued only during the principal's absence (2).

Another rule is that where special powers are followed by general words, the general words are to be construed as limited to what is necessary for the proper exercise of the special powers, and as enlarging those powers only when necessary for the carrying out of the purposes for which the authority is given (a). There are many reported cases illustrating this rule, of which the following are examples. A power of attorney was given by a principal, who carried on business in Australia, to purchase goods either for cash or on credit in connection with the business, and when necessary in connection with any such purchases, or with the business, to make, draw, sign, accept, or indorse any bills of exchange or promissory notes which should be requisite or proper, and it was held that the power gave no authority to borrow money, and the principal was therefore not liable in bills of exchange given in respect of a loan (b). Where power was given to demand and receive all moneys due to the principal on any account whatsoever, to use all means for the recovery thereof, to appoint attorneys to bring actions, and revoke such appointments, and to do all other business, it was held that the words "all other business" must be construed to mean all other business necessary for the recovery of the moneys, and that the agent had no authority to indorse a bill received by him in pursuance of the power (c). Where an executor gave a power of

15 (a power "to sell, indorse and assign," does authorise an indorsement to a bank as security for a loan).

(2) *Danby v. Coutts* (1885) 29 Ch. Div. 500.

(a) *Atwood v. Munnings* (1827) 7 B. & C. 278; 31 R. R. 194; *Harper v. Godsell* (1870) L. R. 5 Q. B. 422; *Bryant v. La Banque du Peuple* [1893]

A. C. 170.

(b) *Jacobs v. Morris* [1902] 1 Ch. 816.

(c) *Hogg v. Smith* (1808) 1 Taunt 347; 9 R. R. 783. Similar cases: *Esdaile v. La Nauze* (1840) 1 Y. & C. 394, 41 R. R. 299; *Hay v. Goldsmidt* (1804) 1 Taunt. 349; 9 R. R. 799; *Murray v. East India Co.* (1821) 5 B. & Ald. 204 24 R. R. 325.

S. 188. attorney to transact in his name all the affairs of the testator, it was held that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally (*d*).

A power of attorney is, however, construed as including all incidental powers necessary for carrying out its object effectively (*e*). A power to commence and carry on all actions, suits, and other proceedings touching anything in which the principal might be in anywise concerned was held to authorise the signature by the agent on behalf of the principal of a bankruptcy petition against a debtor of the principal (*f*). See Powers of Attorneys Act, VII of 1882.

Authority to do every lawful thing necessary for the purpose.—The authority conferred by this section to do things necessary for a business may be excluded either expressly or impliedly by the terms of the agency. Thus where A. appointed B. manager of his silk factory, and executed to him a power of attorney specifying his powers and authority, but the document gave no authority to B. to borrow, it was held that A. was not liable for money borrowed by B. as manager and attorney of A. "Sections 187 and 188...would no doubt authorise a manager to borrow if necessary; but such general provisions are subject to modifications in particular cases, and in this case they were so modified, for the manager had been allowed no power to borrow" (*g*).

Authority of Counsel, Attorney, and Pleader.—Though the relation between a client and an attorney or pleader is that of principal and agent, it is not so in the case of counsel (*h*). Nevertheless counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, without need

(*d*) *Gardner v. Baillie* (1796) 6 T.R. 591; 3 R. R. 531, 538.

(*f*) *In re Wallace* (1894) 14 Q. B. Div. 22.

(*e*) *Howard v. Baillie* (1796) 2 H. Bl. 618; 3 R.R. 531; *Willis v. Palmer* (1859) 7 C. B. N. S. 340; 121 R.R. 522; *Routh v. Macmillan* (1863) 2 H. & C. 750; 133 R. R. 778; *Ex parte Frampton* (1859) 1 D. F. & J. 263; 125 R. R. 443.

(*g*) *Ferguson v. Um Chand Boid* (1905) 33 Cal. 343.

(*h*) Per Lord Esher, M. R., in *Matthews v. Munster* (1887) 20 Q. B. Div. 141, 142.

of further authority, full power to compromise a case on behalf of his client. "Counsel is clothed by his retainer with complete authority over the suit, the mode of conducting it, and all that is incident to it, and this is understood by the opposite party" (i). But this authority does not extend to a compromise of matters outside the scope of the particular case in which he is retained (j), nor to referring the case itself to arbitration on terms different from those which the client has authorised (k). An attorney is entitled in the exercise of his discretion to enter into a compromise, if he does so in a reasonable, skilful, and *bona fide* manner, provided that his client has given him no express directions to the contrary (l). In the only Indian case on the subject, the Court found that the client had authorised his attorney to compromise, and that the compromise was reasonable and proper (m). The case of a pleader stands on a different footing, and he cannot enter into a compromise on behalf of his client without his express authority (n).

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Authority of Factor.—A factor to whom goods are entrusted for sale has authority to sell them in his own name (o), on reasonable credit (p), at such times and at such prices as in his discretion he thinks best (q); to receive payment of the price where he sells them in his own name (r); and to warrant the goods sold, if in the ordinary course of business it is usual to warrant

(i) Bowen, L.J., 20 Q. B. Div. at p. 144; *Jang Bahadur v. Shankar Rai* (1890) 13 All. 272; *Nundo Lal v. Nistarini* (1900) 27 Cal 428; *Jagannathdas v. Ramdas* (1870) 7 B. H. C. O. C. 79. See *Carrison v. Rodriguez* (1886) 13 Cal. 115, where the Court set aside a compromise made by counsel for the plaintiff, and against her express prohibition, the consent decree not having been sealed, and the plaintiff having notified her dissent before the decree was drawn up.

(j) *Nundo Lal v. Nistarini* (1900) 27 Cal. 428.

(k) *Neale v. Gordon Lennox* [1902] A.C. 465.

(l) *Fray v. Voules* (1859) 1 E. & E. 839; 117 R. R. 483; *Prestwich v. Poley* (1865) 18 C. B. N. S. 806 (authority of a managing clerk to compromise).

(m) *Jagannathdas v. Ramdas* (1870) 7 B. H. C. O. C. 79.

(n) *Jagapati v. Ekambara* (1897) 21 Mad. 274.

(o) *Baring v. Corrie* (1818) 2 B. & Ald. 137; 20 R. R. 383; *Ex parte Dixon* (1876) 4 Ch. Div. 133.

(p) *Houghton v. Matthews* (1803) 3 B. & P. 485; 7 R. R. 815.

(q) *Smart v. Sanders* (1846) 3 C.B. 380; 71 R. R. 384.

(r) *Drinkwater v. Goodwin* (1775) Cowp. 251.

8. 188. that particular kind of goods (*s*). But he has no implied authority to barter the goods (*t*), nor to delegate his authority, even if acting under a *del credere* commission (*u*).

Authority of Broker.—A broker authorised to sell goods has implied authority to sell on reasonable credit (*v*); to receive payment of the price if he does not disclose his principal (*w*); and to act on the usages and regulations of the market in which he deals, except so far as such usages or regulations are unlawful or unreasonable (*x*). A usage which, by converting the broker into a principal, changes the intrinsic nature of the contract of agency is regarded as unreasonable (*y*). He has no implied authority to cancel (*z*) or vary (*a*) contracts made by him; nor to receive payment of the price of goods sold on behalf of a disclosed principal (*b*); nor, even when the principal is undisclosed, has he implied authority to receive payment otherwise than in accordance with the terms of the contract of sale (*c*). A broker has no implied power to delegate his authority even if acting under a *del credere* commission (*d*).

A policy broker authorised to subscribe policies on behalf of an underwriter has implied authority to adjust a loss arising under a policy (*e*) and to refer a dispute about such a loss to arbitration (*f*). But he has no implied authority to pay total or partial losses on behalf of the underwriter (*g*). Nor has a policy broker implied

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| (<i>s</i>) <i>Dingle v. Hare</i> (1859) 7 C. B. N. S. 145; 121 R. R. 424. | 2 H. L. 296. |
| (<i>t</i>) <i>Guerreiro v. Peile</i> (1820) 3 B. & Ald. 615; 22 R. R. 500. | (<i>a</i>) <i>Blackburn v. Scholes</i> (1810) 2 Camp. 343; 11 R. R. 723. |
| (<i>u</i>) <i>Cockran v. Irlam</i> (1813) 2 M. & S. 301; 15 R. R. 257. | (<i>b</i>) <i>Linck v. Jameson</i> (1886) 2 T.L.R. |
| (<i>v</i>) <i>Boorman v. Brown</i> (1842) 3 Q. B. 511; 61 R. R. 287. | 206. |
| (<i>w</i>) <i>Campbell v. Hassel</i> (1816) 1 Stark. 233. | (<i>c</i>) <i>Catterall v. Hindle</i> (1867) L. R. 2 C. P. 368. |
| (<i>x</i>) <i>Cropper v. Cook</i> (1868) L. R. 3 C. P. 194; <i>Robinson v. Mollett</i> (1874) L. R. 7 H. L. 802; <i>Sutton v. Tatham</i> (1839) 10 A. & E. 27; 50 R. R. 312. | (<i>d</i>) <i>Cockran v. Irlam</i> (1813) 2 M. & S. 301; 15 R. R. 257; <i>Henderson v. Barnewell</i> (1827) 1 Y. & J. 387; 30 R.R. 799. |
| (<i>y</i>) <i>Robinson v. Mollett</i> (1874) L. R. 7 H. L. 802. | (<i>e</i>) <i>Richardson v. Anderson</i> (1805) 1 Camp. 43 n.; 10 R. R. 628 n. |
| (<i>z</i>) <i>Xenos v. Wickham</i> (1866) L. R. | (<i>f</i>) <i>Goodson v. Brooke</i> (1815) 4 Camp. 163. |
| | (<i>g</i>) <i>Bell v. Auldjo</i> (1784) 4 Doug. 48. |

authority to cancel contracts made by him (*h*); or to receive payment from underwriters of a sum due under a policy by bill of exchange (*i*), or by way of set-off, even if there is a custom by which a set-off is considered equivalent to payment as between brokers and underwriters, unless the principal had notice of the custom and agreed to be bound by it at the time when he authorised the broker to receive payment (*j*).

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Authority of Auctioneer.—An auctioneer has implied authority to sign a contract on behalf of both buyer and seller (*k*), an authority which does not, however, extend to his clerk (*l*). The implied authority of an auctioneer to sign on behalf of the buyer does not, however, extend to a sale of unsold lots by private contract subsequently to the sale by auction (*m*). An auctioneer has no implied authority to take a bill of exchange in payment of the deposit, or of the price of goods sold, though it is provided by the conditions of sale that the price shall be paid to him (*n*); but he may take a cheque in payment of the deposit according to the usual custom (*o*). Authority to sell by auction does not imply any authority to sell by private contract, in the event of the public sale proving abortive, though the auctioneer may be offered a price in excess of the reserve (*p*). Nor has an auctioneer implied authority to rescind a contract of sale made by him (*q*), or warrant goods sold (*r*); nor to deliver goods sold except on payment of the price, or allow the buyer to set off a debt due to him from the seller (*s*).

(*h*) *Xenos v. Wickham* (1866) L. R. 2 H. L. 296.

(*i*) *Hine v. S.S. Insurance Syndicate* (1895) 72 L. T. 79.

(*j*) *Sweeting v. Pearce* (1859) 7 C. E. N. S. 449; *Bartlett v. Pentland* (1830) 10 B. & C. 760; 34 R. R. 560; *Scott v. Irving* (1830) 1 B. & Ad. 605; 35 R. R. 396.

(*k*) *Emmerson v. Heelis* (1809) 2 Taunt. 38; 11 R. R. 520; *White v. Proctor* (1811) 4 Taunt. 209; 13 R. R. 580. But see *Bartlett v. Purnell* (1836) 4 A. & E. 792; 43 R. R. 484.

(*l*) *Bell v. Balls* [1897] 1 Ch. 663. *Cp. Sims v. Landray* [1894] 2 Ch. 318.

(*m*) *Mews v. Carr* (1856) 1 H. & N. 484; 108 R. R. 683.

(*n*) *Williams v. Evans* (1866) L. R. 1 Q. B. 352.

(*o*) *Farrer v. Lacy* (1885) 31 Ch. Div. 42.

(*p*) *Daniel v. Adams* (1704) Amb. 495; *Marsh v. Jelf* (1862) 3 F. & F. 234; 130 R. R. 836.

(*q*) *Nelson v. Aldridge* (1818) 2 Stark. 435; 20 R. R. 709.

(*r*) *Payne v. Leconfield* (1882) 51 L. J. Q. B. 642.

(*s*) *Brown v. Staton* (1816) 2 Chit. 353; 23 R. R. 750.

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Authority of Shipmaster—The extent of a shipmaster's authority to bind his principals personally by contract (*t*), or to sell or hypothecate the ship or cargo (*u*), is governed by the law of the flag, *i.e.*, by the law of the country to which the ship belongs. Thus, if the master of an Italian ship give a bond hypothecating an English cargo under circumstances which according to Italian law do, but according to English law do not, justify the hypothecation, the bond will be held valid, and will be enforced by the English Courts (*v*).

The authorities indicating the extent of the implied authority of masters of British ships are very numerous (*w*). For present purposes it seems sufficient to cite only some of the more important cases. Being appointed to conduct the voyage on which the ship is engaged to a favourable termination, a shipmaster has implied authority to do all things necessary for the due and proper prosecution of the voyage (*x*). He may enter into reasonable towage (*y*) or salvage (*z*) agreements, when necessary for the benefit of the owners, but not merely for the purpose of saving life without regard to the saving of the owners' property (*a*), and may render salvage services to other vessels in distress (*b*). He may pledge his principals' credit for necessary repairs or stores, such as a prudent owner would himself order (*c*), where it is reasonably necessary, under the circumstances of the case, to obtain them on credit (*d*). He may also borrow money on the credit of his principals, if the advance is necessary for the prosecution of the voyage, communication

(*t*) *Lloyd v. Guibert* (1865) 6 B. & S. 100, 120.

(*u*) *The Karnak* (1869) L. R. 2 P.C. 505; *The August* [1891] P. 328.

(*v*) *The Gaetano and Maria* (1882) 7 P. Div. 137.

(*w*) See Bowstead on Agency, 4th ed., pp. 100—107.

(*x*) *Arthur v. Barton* (1840) 6 M. & W. 138; 55 R.R. 542; *Beldon v. Campbell* (1851) 6 Ex. 886; 86 R.R. 534.

(*y*) *Wellfield v. Adamson* (1884) 5 Asp. M. C. 214.

(*z*) *The Renpor* (1883) 8 P.D. 115; *The Inchmaree* [1899] P. 111. Un-

reasonable or inequitable agreements for towage or salvage services will not be enforced: *The Medina* (1876) 2 P. Div. 5. And a salvage agreement made by the master is only binding to the extent of the value of the property saved.

(*a*) See last note.

(*b*) *The Thetis* (1839) L. R. 2 Ad. 365.

(*c*) *Frost v. Oliver* (1853) 1 C. L. R. 1003; *Webster v. Seekamp* (1821) 4 B. & Ald. 352; 23 R. R. 307.

(*d*) *Gunn v. Roberts* (1874) L. R. 9 C. P. 331.

with the principals is impracticable, and they have no solvent agent on the spot (*e*). But he has authority to bind personally only his own principals, or persons who have held him out as their agent (*f*). If a ship is chartered, and possession given up to the charterers, who appoint the master, they and not the registered owners are liable on the master's contracts (*g*). The same principle applies if the ship is chartered to the master himself, and possession given to him. In such case, he alone is liable on his contracts (*h*).

The master of a British ship has also implied authority to give bottomry bonds, hypothecating ship, freight, and cargo, for necessary supplies or repairs in order to prosecute the voyage, when it is not possible to obtain them on personal credit, and communication with the respective owners is impracticable (*i*). The cargo alone may be hypothecated (*respondentia*) if necessary for the benefit of the cargo, or for the prosecution of the voyage, but the owners must in all cases be first communicated with if possible (*j*).

In the case of absolute or urgent necessity, as where in consequence of damage it is impossible to continue the voyage, and the ship cannot be repaired except at such a cost as no prudent owner would incur, the master has implied authority to sell the ship (*k*). But to justify a sale, the necessity must be such as to leave no other alternative, and communication with the owners must be

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- (*e*) *Rocher v. Busher* (1815) 1 Stark. 27; 18 R. R. 742; *Arthur v. Barton* (1840) 6 M. & W. 138; 55 R. R. 542; *Stonchouse v. Gent* (1841) 2 Q. B. 431 n.; 57 R. R. 718 n.; *Edwards v. Harrell* (1853) 14 C. B. 107.
- (*f*) *Mackenzie v. Pooley* (1856) 11 Ex. 638; *Mitcheson v. Oliver* (1855) 5 E. & B. 419. As to holding out, see *Manchester Trust v. Furness* [1895] 2 Q. B. 539; *The Great Eastern* (1868) L. R. 2 Ad. 88.
- (*g*) *Ramwool Manufacture v. Furness* [1893] A. C. 8.
- (*h*) *Frazer v. Marsh* (1841) 13 East, 238; 12 R. R. 336; *Reeve v. Davis* (1834) 1 A. & E. 312; 40 R. R. 300;
- Colvin v. Newberry* (1832) 1 Cl. & F. 283; 33 R. R. 437.
- (*i*) *Kleinwort v. Cassu Marittima Genoa* (1877) 2 App. Cas. 156; *The Staffordshire* (1872) L. R. 4 P. C. 194; *Hussey v. Christie* (1807) 13 Ves. 599; 9 R. R. 585; *Stainbank v. Shepard* (1853) 13 C. B. 418; 93 R. R. 599.
- (*j*) *The Sultan* (1859) Swa. 504; *The Onward* (1873) L. R. 4 Ad. 38; *The Hamburg* (1863) 2 Moo. P. C. (N. S.) 289.
- (*k*) *The Australia* (1859) 13 Moo. P. C. 132; *Robertson v. Clarke* (1824) 1 Bing. 445; 25 R. R. 676; *Ireland v. Thomeon* (1847) 4 C. B. 149; 72 R. R. 560.

B. 188. impracticable (l). Where repairs are absolutely necessary in order to prosecute the voyage, and communication with the owners of the cargo is impracticable, the master has implied authority to sell a portion of the cargo to enable him to continue the voyage (m). But his authority as agent of the owners of the cargo is strictly one of necessity (n), and he is not justified in selling any portion thereof until he has done everything in his power to carry it to its destination (o). In no case has he implied authority to stop the voyage and sell the whole of the cargo in a foreign port, even if a continuation of the voyage is impossible, and to sell appears the best course to take in the owners' interest under the circumstances (o).

A shipmaster has implied authority to enter into contracts for the carriage of merchandise according to the usual employment of the ship (p), and to enter into a charter-party on behalf of the owners if he is in a foreign port, and there is difficulty in communicating with them (q). But he has no implied authority to vary any contract made by the owners (r), or to agree for the substitution of another voyage in place of that agreed upon between the owners and freighters, or to make any contracts outside the scope of the voyage (s). His authority to sign bills of lading is limited to signing for goods actually received on board (t), and he has no authority

(l) *Cobequid Marine Insurance Co. v. Bartheux* (1875) L. R. 6 P.C. 319; *The Bonita* (1861) 30 L. J. Ad. 145.

(m) *Australasian Steam Navigation Co. v. Morse* (1872) L. R. 4 P. C. 222; *Benson v. Duncan* (1849) 3 Ex. 644; 77 R. R. 776.

(n) *Gibbs v. Grey* (1857) 2 H. & N. 22; 115 R. R. 408; *Freeman v. East India Co.* (1822) 5 B. & Ald. 617; 24 R. R. 497.

(o) *Atlantic Mutual Insurance Co. v. Huth* (1879) 16 Ch. D. 474; *Wilson v. Millar* (1816) 2 Stark. 1; 19 R. R. 670; *Acatos v. Burns* (1878) 3 Ex. Div. 282; *Van Omeron v. Dowick* (1809) 2 Camp. 42; 11 R. R. 656.

(p) *Grant v. Norway* (1851) 10 C. B. 665; 84 R. R. 747; *McLean v. Fleming*

(1871) 2 H.L. Sc. App. 123.

(q) *The Fanny* (1883) 5 Asp. M.C. 75; *Grant v. Norway*, *supra*.

(r) *Pearson v. Gischen* (1864) 17 C. B. N. S. 352.

(s) *Burton v. Sharpe* (1810) 2 Camp. 529; 11 R. R. 788.

(t) *Cox v. Bruce* (1886) 18 Q. B. Div. 147; *Hubbersty v. Ward* (1853) 8 Ex. 330; 91 R. R. 519. The master's signature is *prima facie* evidence against the owners that the goods signed for were put on board, but it is not conclusive against them: *Brown v. Powel Duffryn Coal Co.* (1875) L.R. 10 C. P. 562; *Smith v. Bedouin Steam Navigation Co.* [1896] A. C. 70, unless there is an agreement that the bill of lading

to sign at a lower freight than the owners contracted for (u), or making the freight payable to any other persons than the owners (v).

188, 7

189.—An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

Agent's authority in an emergency.

Illustrations.

(a) An agent for sale may have goods repaired if it be necessary.

(b) A. consigns provisions to B. at Calcutta, with directions to send them immediately to C. at Cuttack. B. may sell the provisions at Calcutta, if they will not bear the journey to Cuttack without spoiling.

Illustration (b) seems to be suggested by Story's opinion that, "if goods are perishable and perishing, the agent may deviate from his instructions as to the time or price at which they are to be sold": S. A. § 193. Under this head comes the authority already referred to (w) by which the master of a ship may sell the goods of an absent owner in case of necessity when he is unable to communicate with the owner and obtain his directions (x). But this is not an example for other kinds of agents. "The authority of the master of a ship rests upon the peculiar character of his office, and affords no analogy to the case of an ordinary agent"; and the manager of a business has no implied authority to borrow money on his principal's credit to carry on the business, even if the money is urgently needed (y).

shall be conclusive evidence against the owners as to the quantity shipped: *Lishman v. Christie* (1887) 19 Q. B. Div. 333.

(u) *Pickernell v. Jauberry* (1862) 3 F. & F. 217; 130 R.R. 834.

(v) *Reynolds v. Jez* (1865) 7 B. & S. 86.

(w) P. 673, above.

(z) *Australasian Steam Navigation Co. v. Morse* (1872) L. R. 4 P.C. 222. Whether there is such urgent necessity as to give no time or opportunity for communicating with the owner is a question of fact: *Acalos v. Burns* (1873) 3 Ex. Div. 282.

(y) *Hawtayne v. Bourne* (1841) 7 M. & W. 595, 609; 56 R. R. 806, 810.

S. 190.

Sub-Agents.

190.—An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless by the ordinary custom of trade a sub-agent may, or, from the nature of the agency, a sub-agent must, be employed.

When agent can.
not delegate.

For a similar rule in the case of trustees, see Trusts Act II of 1882, s. 47.

“One who has a bare power or authority from another to do an act must execute it himself and cannot delegate his authority to another”: S. A. § 13. Thus in England the auctioneer at a sale by auction “is the agent of the purchaser as well as of the seller, and has authority to sign a memorandum of the sale so as to bind both parties”; but he cannot of his own motion delegate that authority to his clerk (z). The reason that no such power can be implied as an ordinary incident in the contract of agency is that confidence in the particular person employed is at the root of the contract. Accordingly, auctioneers (a), factors (b), directors of companies (c), brokers (d), and other agents in whom confidence is reposed have, generally speaking, no power to delegate their authority. “But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose, and where that is the case, the reason of the thing requires that the rule should be relaxed.” And “an authority to the effect referred to may and should be implied where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may be reasonably presumed that the parties to the contract originally intended that such authority should exist, or where, in the course of

(z) *Bell v. Balls* [1897] 1 Ch. 663, S. 301; 15 R. R. 257.

669.

(c) *In re Leeds Banking Co.* (1866)

(a) *Coles v. Trecothick* (1804) 9 Ves. L. R. 1 Ch. 561.

234; 7 R. R. 167.

(d) *Henderson v. Barnewell* (1827) 1

(b) *Cockran v. Irlam* (1813) 2 M. & Y. & J. 387; 30 R. R. 799.

8a.
190-10

the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute" (e). So it is "where a shipowner employs an agent for the purpose of effectuating a sale of a ship at any port where the ship may from time to time in the course of its employment under charter happen to be" (e), for it is obvious that the agent cannot himself be prepared to do the business at every such port. Authority to delegate is implied whenever the act to be done by the sub-agent is purely ministerial, and does not involve the exercise of any discretion (f).

In some cases the custom of trade justifies the delegation of special branches of work. Thus it has been found to be a usage of trade for architects and builders to have the quantities taken out from their designs by surveyors, who are more expert in that work, for the purpose of enabling proper estimates to be made; and the surveyor can sue the architect's employer for his charges (g).

191.—A "sub-agent" is a person employed by, and acting under the control of, the original agent in the business of the agency.

The relation of the sub-agent to the original agent is, as between themselves, that of agent to principal. "It may be generally stated that, where agents employ sub-agents in the business of the agency, the latter are clothed with precisely the same rights, and incur precisely the same obligations, and are bound to the same duties, in regard to their immediate employers, as if they were the sole and real principals": S. A. § 386. In the three next following sections the Act has defined, in accordance with settled law, the relations of the ultimate principal to the sub-agent in different cases.

192.—Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub agent, and is bound by and responsible for his acts, as if he were an agent originally appointed by the principal.

(e) *De Bussche v. Alt* (1878) 8 Ch. Div. 288, 310, 311. Co. (1868) L. R. 3 Ch. 461.
(g) *Moon v. Witney Union* (1837) 3 Bing. N. C. 814; 43 R. R. 802.
(f) *Ex parte Birmingham Banking*

s. 192.

Agent's respon-
sibility for sub-agent.

The agent is responsible to the principal
for the acts of the sub-agent.

Sub-agent's re-
sponsibility.

The sub-agent is responsible for his
acts to the agent, but not to the principal,
except in case of fraud or wilful wrong.

Principal and sub-agent.—Where authority to appoint a sub-agent in the nature of a substitute for the first agent "exists" either by agreement or as implied in the nature of the business "and is duly exercised, privity of contract arises between the principal and the substitute, and the latter becomes as responsible to the former for the due discharge of the duties which his employment casts upon him, as if he had been appointed agent by the principal himself" (h). This is the class of cases contemplated in s. 194. Otherwise the sub-agent looks to and is controlled by the agent who appointed him, and is not under any contract with the principal. If money due to A. is paid to P., who is Z's servant, Z, having authority from A. to collect it, P. is accountable only to Z., and A. cannot recover the money direct from P. (i). But a sub-agent is accountable to the principal for a secret commission improperly received by him (j).

And a sub-agent who does not know that his employer is an agent is entitled to the same rights as any other contracting party dealing with an undisclosed principal (see ss. 231, 232, p. 750, below). "If A. employs B. as his agent to make any contract for him, or to receive money for him, and B. makes a contract with C., or employs C. as his agent, if B. is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C. to be acting as an agent for any one, A. cannot make a demand against C. without the latter being entitled to stand in the same position as if B. had in fact been a principal. If A. has allowed his agent B. to appear in the character of a principal he must take the consequences" (k).

(h) *De Bussche v. Alt* (1878) 8 Ch. Div. 286, 311.

(i) *Stephens v. Badcock* (1832) 3 B. & Ad. 354; 37 R. R. 448;

(j) *Powell v. Jones* [1905] 1 K. B.

11, C. A.

(k) *Bowen, L.J., in Montagu v. Forwood* [1893] 2 Q. B. 350, 355. *Cp.*

New Zealand and Australian Land Co. v. Watson (1881) 7 Q. B. Div. 374.

Accordingly where goods consigned have been sold in good faith by a sub-agent appointed by the consignee, and the proceeds have been brought into account between the consignee and the sub-agent, the latter is not liable to account to the consignor. His account with the consignee cannot be interfered with by the consignee's principal except on the ground of bad faith (l).

Agent's responsibility for sub-agent.—A commission agent for the sale of goods, who properly employs a sub-agent for selling his principal's goods, is liable to the principal for the sub-agent's fraudulent disposition of the goods within the course of his employment. The last clause of this section, giving a principal in cases of fraud or wilful wrong the right of recourse to the sub-agent, does not exclude the principal's normal right of recourse to his agent. In fact, the total effect of the section is to give an option to the principal where a fraud or wilful wrong is committed by the sub-agent (m).

193.—Where an agent, without having authority to do so, has appointed a person to act as a sub-agent, the agent stands towards such person in the relation of a principal to an agent, and is responsible for his acts both to the principal and to third persons; the principal is not represented by or responsible for the acts of the person so employed, nor is that person responsible to the principal.

If the sub-agent purports to act in the name of the ultimate principal that principal may adopt his acts by ratification, as he might adopt acts purporting to be done on his behalf by any other person (ss. 196—200, pp. 682—688, below). But it is conceived that, if a sub-agent acts in his own name or in that of the agent who has taken on himself without authority to delegate to him business which is in fact the principal's, the acts so done cannot be ratified by the principal.

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- (l) *Peacock v. Baijnath* (1891) 18 Cal. 573, 613; L. R. 18 Ind. Ap. 78. sub-agent was a muckadam employed by the commission agent. As to the position of a dubash in Madras, see *South Indian Industrials Ltd. v. Minda Rama Jogi* (1914) 27 Mad. L. J. 501.
- (m) *Nensukhdas v. Birdichand* (1917) 19 Bom. L. R. 948. The agent in this case was a commission agent acting for an up-country constituent, and the

See
192, 11

84.
108, 104.

A person to whom a trust has been improperly delegated is not an agent of the beneficiaries, but he is not the less liable to account to them, independently of agency, for trust property which has come to his hands (n).

194.—Where 'an agent, holding 'an express or implied authority to name another person to 'act for the principal in the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the 'agency as is entrusted to him.

Relation between principal and person duly appointed by agent to act in business of agency.

Illustrations.

(a) A. directs B. his solicitor, to sell his estate by auction, and to employ an auctioneer for the purpose. B. names C. an auctioneer, to conduct the sale. C. is not a sub-agent, but is A.'s agent for the conduct of the sale.

(b) A. authorises B., a merchant in Calcutta, to recover the moneys due to A. from C. & Co. B. instructs D., a solicitor, to take legal proceedings against C. & Co. for the recovery of the money. D. is not a sub-agent, but is solicitor for A.

In such cases as are put in the illustrations B., as between A. and the auctioneer or solicitor, is treated as merely the messenger of A.'s direct authority. This section apparently means to draw a clearly marked line between an ordinary sub-agent and a person who is put in relation with the principal, a "substitute" as he is called in a passage already quoted above (o). The distinction is probably convenient, though we cannot find it so sharply defined in any English authority. Apparently this section covers the case of an upper servant in a household who has authority to select and dismiss under servants, although the language is perhaps not the most appropriate. Such a servant, at any rate, is not answerable to third persons for acts or defaults of those under him which he has not specifically authorised (p).

(n) *Myler v. Fitzpatrick* (1822) 6 Madd. 360; 23 R. R. 247. *Re Barney* [1892] 2 Ch. 265.

(o) *De Bussche v. Alu*, 8 Ch. Div. at pp. 310, 311.

(p) "It was never heard of that a servant who hires labourers for his master was answerable for all their acts": *Stone v. Cartwright* (1795) 6 T. R. 411; 3 R.R. 220.

A receiver appointed to carry on a business by mortgagees, trustees for debenture-holders, or the like, appears to be in a similar position (g), though it by no means follows that those who appoint him under the special powers conferred on them for that purpose, whether by law or by agreement of parties, are liable as principals for his acts (r). In Bombay, the appointment of a muceadam by a commission agent acting for an up-country constituent is an ordinary case of the appointment of a sub-agent. The muceadam is not a substituted agent of the up-country constituent (s).

195.—In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and if he does this he is not responsible to the principal for the acts or negligence of the agent so selected.

Agent's duty in naming such person.

Illustrations.

(a) A. instructs B. a merchant, to buy a ship for him. B. employs a ship surveyor of good reputation to choose a ship for A. The surveyor makes the choice negligently, and the ship turns out to be unseaworthy, and is lost. B. is not, but the surveyor is, responsible to A.

(b) A. consigns goods to B., a merchant, for sale. B., in due course, employs an auctioneer in good credit to sell the goods of A. and allows the auctioneer to receive the proceeds of the sale. The auctioneer afterwards becomes insolvent without having accounted for the proceeds. B. is not responsible to A. for the proceeds.

Little, if any, direct authority can be produced for this rule (t), but it is not open to doubt in English law. Were it otherwise, no man would take the responsibility of choosing an agent for another without an express indemnity.

(g) *Owen & Co. v. Cronk* [1895] 1 Q. B. 265. See per Lord Esher at p. 272.

(r) *Gosling v. Gaskell* [1897] A.C. 575.

(s) *Nensukhdas v. Birdichand* (1917) 19 Bom. L. R. 948, 960. As to a *dubash*

in Madras, *South Indian Industrials Ltd v. Mindi Rama Jogi* (1914) 27 Mad. L.J. 501.

(t) See, however, *Cahill v. Dawson* (1857) 3 C. B. N. S. 108; 111 B. R. 565.

Ratification.

196.—Where acts are done by one person on behalf of another, but without his knowledge or authority, he may elect to ratify or to disown such acts. If he ratify them, the same effects will follow as if they had been performed by his authority.

Right of person
as to acts done for
him without his
authority. Effect
of ratification.

Conditions of Ratification: "On behalf of another."—The rules on this subject are now familiar in the common law. Some of them are perhaps over-subtle, but on the whole they are for the advantage of commerce. Ratification must be by the person for whom the agent professes to act. "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority" (u). But "where A. does an act as agent for B. without any communication with C., C. cannot, by afterwards adopting that act, make A. his agent and thereby incur any liability, or take any benefit, under the act of A." (v). "Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognised in s. 196 of the Indian Contract Act" (w).

"A ratification of the unauthorised contract of an agent can only be effectual when the contract has been made by the agent avowedly for, or on account of, the principal, and not when it has been made....on account of the agent himself" (x).

(u) *Wilson v. Tumman* (1843) 6 Man. & Gr. 236, 243; 64 R. R. 770, 776, *per* Cur.

v. Debi Dayal Sahu (1908) 12 C. W. N. 393, 408; L. R. 35 Ind. Ap. 43, 58.

(v) *Id.*, head-note.

(r) *Per Cur. in Shiddheswar v. Ramchandarav* (1882) 6 Bom. 463, 466.

(w) *Raja Rai Bhagwat Dayal Singh*

It is finally settled in England that a man cannot adopt by ratification an act which was not authorised by him at the time and did not purport to be done on behalf of any principal (y).

Since a ratification is in law equivalent to a previous authority, a person not competent to authorise an act cannot give it validity by ratifying it (z).

"Ratification must be by an existing person on whose behalf the contract might have been made at the time" (a). Thus a newly-formed company cannot ratify an act done in its name before it was incorporated (b). And where a time is limited for doing an act, and A. does it on behalf of B., but without his authority, within that time, B. can ratify it only before the time has expired (c).

The person on whose behalf an act purports to be done need not be individually known to the agent; it is enough if he is ascertainable as owner of specified property or the like. A man may effect an insurance on behalf of all persons interested, and any such person may adopt the contract of insurance for his own share by ratification (d). A bailiff may receive the rent of land on behalf of the unknown heirs of the last owner in possession, and those heirs, when their title is ascertained, can ratify his acts (e).

"Acts done without knowledge or authority".—An act done by an agent in excess of his authority may also be ratified (f). But "there is a wide distinction between ratifying a particular act which has been done in excess of authority and conferring a general power to do similar acts in future." Therefore the ratification by a company of

(y) *Keighley, Maxted & Co. v. Durant* [1901] A. C. 240. The decision of the C. A., which the H. L. reversed (see [1900] 1 Q. B. 629), was certainly novel; *Raghavachari v. Pakkai Mahomed* (1916) 30 Mad. L. J. 497, 501.

(z) *Irvine v. Union Bank of Australia* (1877) 3 Cal. 280, 285; L. R. 4 Ind. Ap. 86; 2 App. Ca. 366.

(a) *Kelner v. Baxter* (1866) L. R. 2 C. P. 174, 185.

(b) *In re Empress Engineering Co.* (1880) 16 Ch. Div. 125; *Ganesh Flour*

Mills Co. v. Puran Mal (1905) *Punj. Rec.* no. 2.

(c) *Dibbins v. Dibbins* [1896] 2 Ch. 348.

(d) *Hagedorn v. Oliverston* (1814) 2 M. & S. 485; 15 R. R. 317. And such ratification is good even after known loss: *Williams v. North China Insurance Co.* (1876) 1 C. P. Div. 757.

(e) *Lyell v. Kennedy* (1889) 14 App. Ca. 437, 456.

(f) *Secretary of State v. Kamachee Boye* (1859) 7 M. L. A. 476.

8. 196. certain acts done by its directors in excess of the authority given to them by the articles of the company does not extend the authority of the directors so as to authorise them to do similar acts in future (g).

Retrospective effect.—Ratification, if effective at all, relates back to the date of the act ratified. If an action is brought in a man's name without his knowledge, he may adopt the proceedings and make them good at any time before trial (h). The rule goes so far that if A. makes an offer to B. which Z. accepts in B.'s name without authority, and B. afterwards ratifies the acceptance, an attempted revocation of the offer by A. in the time between Z.'s acceptance and B.'s ratification is inoperative (i). So long as the professed agent purports to act on behalf of the principal, it is immaterial whether in his own mind he intends the principal's benefit or not, and what his real motive and intention may be; nor does it make any difference if the third party discovers before ratification that the agent meant to keep the contract for himself (j). In fact, the third party gets by the ratification exactly what he bargained for.

But if Z. pays money to B. as in satisfaction of A.'s debt, and B. afterwards discovering that Z. had no authority, returns him the money by agreement between them, A. can no longer adopt the payment and rely on it as a discharge. A man is not bound to accept payment of a debt, or satisfaction of any other obligation, from a stranger to the contract, though, if B. had accepted the payment with knowledge of Z.'s want of authority, or acquiesced in it after he obtained that knowledge, he would have been estopped from denying Z.'s authority as against A. (k).

(g) *Irvine v. Union Bank of Australia* (1877) 3 Cal. 280, 287; L. R. 4 Ind. Ap. 86; 2 App. Ca. 366, 375.

(h) *Ancona v. Marks* (1862) 7 H. & N. 686; 126 R. R. 646. The action was on negotiable instruments, and the most plausible form of the argument for the defence was that the plaintiff was not the holder of the instruments at the time of suing.

(i) *Bolton Partners v. Lambert* (1889) 41 Ch. Div. 295. This decision

has been freely criticised, but for the present remains authoritative. It is open to reconsideration in a Court of last resort: see the judgment of the Judicial Committee in *Fleming v. Bank of New Zealand* [1900] A. C. 577, 587.

(j) *Re Tiedemann and Ledermann Freres* [1899] 2 Q. B. 66.

(k) *Walter v. James* (1871) L. R. 6 Ex. 124. The language of Kelly, C.B., about "mistake in fact" is not incorrect, but also not luminous.

What acts cannot be ratified.—A transaction which is void *ab initio* cannot be ratified (l). This is illustrated in England by a line of cases in company law marking the distinction between irregularities capable of being made good if the act is ratified by a general meeting, or the whole body of shareholders, and acts not within the company's objects as defined by its original constitution, and therefore incapable of being made binding on the company by any ordinary means known to the law (m). It is not clear whether this rule extends to the case of a forged signature so as to prevent the person whose signature has been forged from adopting the instrument even for civil purposes (n). That such adoption would not relieve the forger from criminal liability is admitted. In any case it would seem that there is no question of agency unless the offender purports to sign by procuration. It is beyond our scope to consider under what conditions a man may be estopped by his own words or conduct, apart from agency or ratification, from denying that a certain signature was his.

See
196, 197.

Agents of Government.—Acts done by public servants in the name of the Crown, or the Government of India, may be ratified by subsequent approval in much the same way as private transactions (see *Secretary of State v. Kamachee Boye* (o) and *Collector of Masulipatam v. Caval Vencata* (p)). In these cases the effect may not be to create legal duties but, where the acts in question are of the kind known as "acts of State," to preclude courts of law from entertaining any claim founded upon them (q). Such acts are political, and outside the scope of municipal law, and cannot, in ordinary circumstances, occur within the jurisdiction.

197.—Ratification may be expressed or may be implied

Ratification may be expressed or implied. in the conduct of the person on whose behalf the acts are done.

(l) *Manji Ram v. Tara Singh* (1881) 3 All. 852 (not an ordinary case of agency, but the principle is the same).

(m) See Pollock on Contract, Appendix, Note D.

(n) In 1871 the majority of the Court of Exchequer held that such an adoption did not create a cause of action: *Brook v. Hook*, L. R. 6 Ex. 89. Ten

years later Lord Blackburn expressed a decided opinion that it would: *McKentie v. British Linen Co.*, 6 App. Ca. 82, 99.

(o) (1859) 7 M. I. A. 476.

(p) (1860) 8 M. I. A. 529, 554.

(q) *Baron v. Denman* (1847) 2 Ex. 167; 76 R. R. 554; see more in Pollock on Torts, 10th ed. pp. 117-120.

Illustrations.

8a.
, 198.

(a) A., without authority, buys goods for B. Afterwards B. sells them to C. on his own account. B.'s conduct implies a ratification of the purchase made for him by A.

(b) A., without B.'s authority, lends B.'s money to C. Afterwards B. accepts interest on the money from C. B.'s conduct implies a ratification of the loan.

Express ratification.—An express ratification cannot become complete until it is communicated; till then it is liable to revocation (r).

Implied ratification.—Assent to an act done on one's behalf, like consent to an agreement, may be conveyed otherwise than in words (*cp. s. 9, p. 62, above*); and taking the benefit of the transaction is the strongest, as it is the most usual, evidence of tacit adoption. Accepting the results of the agent's proceeding, whether obviously beneficial to the principal or not, will have the same effect. Where an agent, without authority to do so, referred certain matters to arbitration, and the principal, after knowledge of the arbitration proceedings, acquiesced in them and did not raise any objection thereto, it was held that his conduct amounted to a ratification of the reference (s).

198.—No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

Knowledge requisite for valid ratification.

English authority is to the effect that a principal is not liable for excessive or irregular execution of his authority (nor *a fortiori* for a wholly unauthorised act done on his behalf) unless he ratifies the act with knowledge of the irregularity, or shows an intention "to take upon himself, without inquiry, the risk of any irregularity" (t). More lately the Judicial Committee laid down in general terms that "acquiescence and ratification must be founded on a full knowledge of the facts, and further it must

(r) *Rajagopalacharyulu v. The Secretary of State for India* (1915) 38 Mad. 997, 1008. (s) *Lewis v. Read* (1845) 13 M. & W. 834; 67 R. R. 828.

(*) *Sahajit Pertap Bahadoor v. Dulhin*

be in relation to a transaction which may be valid in itself and not illegal, and to which effect may be given as against the party by his acquiescence in and adoption of the transaction" (u). The two latter conditions might perhaps have been more clearly expressed. Still more lately the Court of Appeal in England has said: "To constitute a binding adoption of acts *a priori* unauthorised these conditions must exist: (1) the acts must have been done for and in the name of the supposed principal, and (2) there must be full knowledge of what those acts were, or such an unqualified adoption that the inference may properly be drawn that the principal intended to take upon himself the responsibility for such acts, whatever they were." Reluctant ratification by a solicitor of an unauthorised use of his name which is represented as merely formal, and at the time reasonably appears so, will not make him, still less his firm, liable for the loss caused to third persons by money having been taken out of court under the assumed authority and, afterwards misapplied (v).

The Act does not expressly deal with the possible case of the principal deliberately waiving inquiry so as to make the agent's act his own at all hazards. Such cases fall under the general rule that a free agent may waive a legal advantage if he thinks fit, and there is no reason to suppose that the English authorities would not be followed.

199.—A person ratifying any unauthorised act done on his behalf ratifies the whole of the transaction of which such act formed a part.

Effect of ratifying unauthorised act forming part of a transaction.

It is obvious that a man cannot at his own choice ratify part of a transaction and repudiate the rest (w). The only possible exception is in the case of the part repudiated being wholly for the principal's benefit, which is not likely to occur. The general rule is

(u) *La Banque Jacques-Cartier v. La Banque d'Epargne, etc* (1887) 13 App

Ca. 111. The appeal was from the Province of Quebec, but the principle is one of universal jurisprudence.

(v) *Marsh v. Joseph* [1897] 1 Ch. 213, 246.

(w) See *Keay v. Fenwick* (1876) 1 C.P.D. 745, 753. Authority is really needless.

Ss.
199, 200.

that, "where a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent": S. A. § 250.

200.—An act done by one person on behalf of another without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

Ratification of
unauthorised act
cannot injure third
person.

Illustrations.

(a) A., not being authorised thereto by B., demands, on behalf of B., the delivery of a chattel, the property of B., from C., who is in possession of it. This demand cannot be ratified by B., so as to make C. liable for damages for his refusal to deliver (x).

(b) A. holds a lease from B., terminable on three months' notice. C., an authorised person, gives notice of termination to A. The notice cannot be ratified by B., so as to be binding on A. (y).

This is the converse of the principle that a voidable transaction cannot be rescinded to the prejudice of third persons' rights acquired under it in good faith. Rights of property cannot be changed retrospectively by ratification of an act inoperative at the time. The rule is also stated in the form that ratification, to make an act rightful which otherwise would be wrongful, must be at a time when the principal could still have lawfully done it himself (z). The ratification of a contract does not give the principal a right to sue for a breach committed prior to the ratification (a). A. holds a lease from two joint receivers, B. and C. B., without C.'s authority, gives notice to quit to A. The notice cannot be ratified by C. so as to be binding on A. (b).

(x) S. A. §247. Cp. *Bird v. Brown* (1850) 4 Ex. 786; 80 R.R. 775, where the act was stoppage in transit, and the recognition of the same rule in the House of Lords in *Lyell v. Kennedy* (1889) 14 App. Ca. 437, 461, 462.

(y) Such a notice, in order to be good, must be binding on all parties concerned at the time when it is given: *Right & Fisher v. Cutbell* (1804) 5 East, 491;

7 R. R. 752, from which this illustration appears to be simplified.

(z) *Bird v. Brown* (1850) 4 Ex. 786; 80 R. R. 775.

(a) *Kidderminster v. Hardwick* (1873) L. R. 9 Ex. 13.

(b) *Cassim Ahmed v. Eusuf Haji Ajam* (1916) 23 Cal. L. J. 453. Joint receivers unlike joint owners, should all join in giving the notice.

Revocation of Authority.

201.—An agency is terminated by the principal revoking his authority ; or by the agent renouncing the business of the agency ; or by the business of the agency being completed ; or by either the principal or agent dying or becoming of unsound mind ; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

This is English law, subject to the remark that there is little authority as to the case of insanity, and it was formerly thought that insanity of either principal or agent would determine the agency only if it had been judicially established by "inquisition" (c). But it seems the true rule is that the principal's insanity in fact is sufficient to annul the agent's authority (d). The present section has, in any case, made the law clear in India. We have to read it with the following ones to 210 inclusive, which modify its effect in various ways.

Completion of business of agency.—The Allahabad and Calcutta High Courts hold that where an agent for the sale of goods receives the price, the agency does not terminate on the sale of the goods, but continues until payment of the price to the principal. S. 218 (p. 716, below) provides "that an agent is bound to pay to his principal all sums received on his account. Clearly then the business does not terminate on receipts of the money by the agent, inasmuch as there is a subsequent obligation to account for the sums and to pay them" (e). In a Madras case, Wallis, C.J., expressed the opinion that the agency terminates when the sale is completed, and that it does not continue until payment of the price (f). The question in the above cases was one of limitation (g). But the authority of an agent for sale to contract on the principal's behalf

(c) Kent, Comm. ii. 645.

Doss (1899) 26 Cal. 715, 724, 725.

(d) So assumed in *Yonge v. Toynbee* [1910] 1 K. B. 215, C.A.

(f) *Venkatachalan v. Narayanan* (1916) 39 Mad. 376, 378-379.

(e) *Babu Ram v. Ram Dayal* (1890) 12 All. 541, followed in *Fink v. Buldeo*

(g) See the Limitation Act, 1908, Sch. I, art. 52.

- s. 201. ceases as soon as the sale is completed. He has no power to alter the terms of the contract without fresh authority from the principal (h).

The authority of an agent to collect bills and to remit the amount, when realized, by drafts, terminates as soon as the drafts are despatched (i).

Death of principal.—A power of attorney to an agent to present a document for registration is revoked by the death of the principal. It was accordingly held by the Judicial Committee that where the principal died before the presentation, and the registrar, knowing of the principal's death, accepted and registered the document, the registration was invalid (j). Where a power of attorney is given by the members of a joint Hindu family to one of them in connection with the family business, it is a question of construction in each case whether the power comes to an end on the death of any of them or whether it is to continue even after then (k). See notes to s. 209, below.

Where the agency is for a fixed term.—“Where an agent has been appointed for a fixed term, the expiration of the term puts an end to the agency, whether the purpose of the agency has been accomplished or not; consequently where an agency for sale has expired by express limitation, a subsequent execution thereof is invalid, unless the term has been extended” (l).

Payment or act by attorney under power.—S. 3 of the Powers of Attorney Act VII of 1882 provides that any person making or doing any payment or act in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that, before the payment or act, the donor of the power had died or become lunatic or insolvent, or had revoked the power, if

(h) *Blackburn v. Scholes* (1810) 2 (1800) 23 All. 233; L. R. 28 Ind. Ap. 15. Camp. 343; 11 R. R. 723. And see (k) *Re Sital Prasad* (1916) 21 Cal. Seton v. Slade (1802) 7 Ves. 265, 276; W. N. 620.

6 R. R. 124.

(i) *Alliance Bank of Simla, Ltd. v. Dadabhai* (1916) 23 Cal. L. J. 190, 202. *Amritsar Bank* (1915) Punj. Rec. no. 79, p. 322. This is really too elementary to need authority.

(j) *Mujid-un-Nissa v. Abdur Rahim*

the fact of the death, etc., was not at the time of the payment or act known to the person making or doing the same. Ss. 201, 202.

202.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

Termination of agency, where agent has an interest in subject-matter.

Illustrations.

(a) A. gives authority to B. to sell A.'s land, and to pay himself out of the proceeds, the debts due to him from A. A. cannot revoke this authority, nor can it be terminated by his insanity or death. [*Gauseen v. Morton* (1830) 10 B. & C. 731; 34 R. R. 558.]

(b) A. consigns 1,000 bales of cotton to B., who has made advances to him on such cotton, and desires B. to sell the cotton, and to repay himself, out of the price, the amount of his own advances. A. cannot revoke this authority, nor is it terminated by his insanity or death: S. A. § 371.

Authority coupled with interest.—In these cases the current phrase is that the agent's authority is "coupled with an interest." In England, however, this does not seem to be quite accurate, unless it is understood that the word "coupled" implies, beyond the mere fact of the agent having an interest in the subject-matter, some specific connection between the authority and the interest. The principle is thus stated: "that where an agreement is entered into on a sufficient consideration, whereby an authority is given for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable" (m). In fact, the circumstances must be such that revocation of the authority would be a breach of faith against the agent. The language of this section is wider. Still there is not any evident intention to overrule the English decisions. In fact, illustration (b) supplies just the circumstances which, in a leading English case where the authority was held to be revocable, were wanting, namely, that the consignment is made after

(m) *Smart v. Sandars* (1848) 5 C. B. 2 H. & N. 199, 200; 115 R. R. 489, at p. 917; 75 R. R. 861, approved in *Ex. Ch.*; adopted by Lindley, L.J., in *Taplin v. Florence* (1851) 10 C. B. in *Carmichael's Case* [1896] 2 Ch. 643, 744, 758; repeated word for word by Williams, J., in *Clerk v. Laurie* (1857) 648.

8. 202. the factor's advances, and with an express request by the principal to repay himself out of the price of the goods. In that case the Court said: "We think this doctrine"—i.e., the rule of the present section—"applies only to cases where the authority is given for the purpose of being a security, or . . . as a part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only; as, for instance, in the present case . . . the goods are consigned to a factor for sale. This confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest, but an independent authority, and an interest subsequently arising. The making of such an advance may be a good consideration for an agreement that the authority to sell shall be no longer revocable; but such an effect will not, we think, arise independently of agreement" (n). The material variation of the facts in this case which is given in illustration (b) does amount to evidence of agreement. Whether there is such an agreement in a particular case is a question of fact (o). Recent Indian decisions, as we shall immediately see, take the same line. The Act itself is, of course, the primary authority (p).

A direction by A. to B. to receive income payable to A., and apply it towards discharge of A.'s debt to Z., is obviously not an authority coupled with an interest in B., whether the revocation of it would or would not be a breach of any contract between A. and Z.; but in such circumstances loosely worded or ambiguous new instructions from A. to B. will not be readily construed as a revocation (q).

A recent example of a transaction including such an agreement as the rule requires is that of an "underwriting contract" addressed to the vendor-promoter of a new company. Here we

(n) *Smart v. Sanders* (1848) 5 C. B. 895, 918. And see *Frith v. Frith* [1906] A. C. 254.

(o) *De Comas v. Prost* (1865) 3 Moo. P. C. (N. S.) 158.

(p) See 17 Bom. at pp. 543, 545; 20 Mad. at p. 103.

(q) *Clerk v. Laurie* (1857) 2 H. & N. 199; 115 R. R. 489, argued mainly on the question whether the authority was revocable, but decided on the ground that in any case there was nothing amounting to a revocation.

have a bargain by which, for valuable consideration in the form of commission, the underwriter agrees to take certain shares, and this he knows to be for the benefit of the promoter, who is to be paid out of money raised by the issue of shares, and in order to enable the promoter the better to secure the performance of the contract the underwriter authorises the promoter to apply for shares in his name, and expressly agrees not to revoke that authority. The authority is coupled with an interest, and an allotment of shares to the underwriter on the promoter's application, makes him a member of the company notwithstanding an attempted revocation in the meantime (*r*).

S. 204.

Indian authorities.—The interest which an agent has in effecting a sale and the prospect of remuneration to arise therefrom do not constitute such an interest as would prevent the termination of the agency (*s*). Upon the same principle, where an agent is appointed to collect rents, and his salary is agreed to be paid out of those rents, it does not give the agent an interest in the subject-matter of the agency within the meaning of this section (*t*). But where an agent is authorised to recover a sum of money due by a third party to the principal, and to pay himself, out of the amount so recovered, the debts due to him from the principal, the agent has an interest in the subject-matter of the agency, and the authority cannot be revoked (*u*).

Factors for Sale of Goods.—The question has often arisen as to whether a factor who has made advances as against goods consigned to him for sale has such an interest in the goods consigned as to prevent the termination of his authority to sell. The result of the cases appears to be that the authority of a factor to sell is in its nature revocable, and the mere fact that advances have been made by him, whether at the time of his employment as such or subsequently,

(*r*) *Carmichael's Case* [1896] 2 Ch. 643, 647.

(*s*) *Lakshmichand v. Chotooram* (1900) 24 Bom. 403.

(*t*) *Vishnucharya v. Ramchandra* (1881) 5 Bom. 253.

(*u*) *Pestonji v. Matchett* (1870) 7 B. H. C. A. C. 10. See also *Subrahma-*

nia v. Narayanan (1901) 24 Mad. 130, and *Jayabhai v. Rastamji* (1885) 9 Bom. 311. *Clerk v. Laurie*, 2 H. & N. 199, cited above, would have resembled these cases if the debt which the hanker was directed to pay had been due to himself and not to a third person.

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202, 203.

cannot have the effect of altering the revocable nature of the authority to sell, unless there is an agreement express or implied between the parties that the authority shall not be revoked (v). Where the factor is expressly authorised to repay himself the advances out of the sale proceeds, as in illustration (b), he has an interest in the goods consigned to him for sale, and the authority to sell cannot be revoked. In such a case "an interest in the property" is expressly created. But the "interest" need not be so created, and it is enough to prevent the termination of the agency that the "interest" could be inferred from the language of the document and from the course of dealings between the parties. Thus where a factor who had made advances as against goods consigned to him for sale was authorised to sell them "at the best price obtainable," and in the event of a shortfall to draw on the consignor, it was held that this arrangement gave an interest to the factor in the goods, and that the authority to sell could not be revoked (w).

203.—The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal [S. A. § 465.]

When principal
may revoke agent's
authority.

What amounts to exercise of authority.—An agent authorised to purchase goods on behalf of his principal cannot be said to have exercised the authority so given to him "so as to bind the principal" if he merely appropriates to the principal a contract previously entered into by himself with a third party. Such an appropriation does not create a contractual relation with a third party, and the principal, therefore, may revoke the authority (x).

Authority given to an auctioneer to sell goods by auction may be revoked at any time before the goods are knocked down to a purchaser (y), and authority given to a policy broker to effect a policy

(v) *Jafferbhoy v. Charlesworth* (1893) 17 Bom. 520, 542, citing *De Comas v. Prost*, 3 Moo. P. C. 158, 179.

(w) *Kondayya v. Narasimhulu* (1896) 20 Mad. 97.

(x) *Lakshmichand v. Chottooram* (1900) 24 Bom. 403.

(y) *Warlow v. Harrison* (1850) 1 E. & E. 309; 117 R. R. 227; *In re Hare & O'More's Contract* [1901] 1 Ch. 93.

at any time before the policy is executed so as to be legally binding (2). Authority to pay money in respect of an unlawful transaction may be revoked at any time before it has actually been paid, even if it has been credited in account (a).

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203, 2

204.—The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

Revocation
where authority
has been partly
exercised.

Illustrations.

(a) A. authorises B. to buy 1,000 bales of cotton on account of A., and to pay for it out of A.'s money remaining in B.'s hands. B. buys 1,000 bales of cotton in his own name, so as to make himself personally liable for the price. A. cannot revoke B.'s authority so far as regards payment for the cotton. [U.K. D. 17, 1, *Mandati vel. contra*. 15.]

(b) A. authorises B. to buy 1,000 bales of cotton on account of A., and to pay for it out of A.'s moneys remaining in B.'s hands. B. buys 1,000 bales of cotton in A.'s name, and so as not to render himself personally liable for the price. A. can revoke B.'s authority to pay for the cotton.

Authority partly exercised.—The rule here laid down is connected with the principal's duty to indemnify the agent (s. 222 below). "If a principal employs an agent to do something which by law involves the agent in a legal liability"—or even in a customary liability by reason of usage in that class of transactions known to both agent and principal—"the principal cannot draw back and leave the agent to bear the liability at his own expense" (b). There is no conclusive English authority really covering the ground, but Lord Lindley states it as the better opinion that "an agent who has already acted on his instructions, and has thereby incurred a legal obligation to third parties, . . . is not bound on the command of his principal

(c) *Warwick v. Slide* (1811) 3 Camp. 127; 13 E. R. 772. *Cp. Thompson v. Adams* (1889) 23 Q. B. D. 361.

(a) *Edgar v. Fowler* (1803) 3 East, 222; 7 R. R. 433; *Taylor v. Bowers* (1876) 1 Q. B. Div. 291; *Hastelow v. Jackson* (1828) 8 B. & C. 221; 32 R. R. 369.

(b) *Read v. Anderson* (1884) 13 Q. B. Div. 770, 783, per Bowen, L.J. The question whether undoubted principle was rightly applied in this case by the majority of the Court, having regard to the statute law, which is not material here, was cut short by the Gaming Act 1892.

Se.
204, 205.

to stop short and refuse to perform the obligation incurred. There is no doubt that, as between himself and his principal, an agent is *entitled* to obey the counter-order, and to obtain a full indemnity from the consequences of so doing. But it is apprehended that he is at liberty so far to carry out the instructions on which he has begun to act as may be necessary to relieve himself from all the legal liabilities incurred before notice of the countermand, and, having done so, to insist upon indemnity and reimbursement as if the principal had not changed his instructions" (c).

205.—Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

Compensation
for revocation by
principal or
renunciation by
agent.

Compensation for Revocation.—By this section "the principal is bound to make compensation to the agent whenever there is an express or implied contract that the agency shall be continued for any period of time. This would probably always be the case when a valuable consideration had been given by the agent" (d).

The valuable consideration here spoken of must be something more than undertaking the agency. Where A. appointed B. as exclusive agent for the sale of A.'s coal in Liverpool for seven years, and B. undertook not to sell any other owner's coal there during that time without A.'s consent, this was decided by the House of Lords not to imply any condition that A. should continue to keep his colliery during the term. "Upon such an agreement as that . . . , unless there is some special term in the contract that the principal shall continue to carry on business, it cannot for a moment be implied as matter of obligation on his part that, whether the business is a profitable one or not, and whether for his own sake he wishes to carry it on or not, he shall be bound to carry it on for the benefit of the agent and the commission that he may receive" (e).

(c) Lindley on Partnership, 433.

(d) *Per Cur.* in *Vishnucharya v. Ramchandra* (1881) 5 Bom. 253, 256.

(e) *Rhodes v. Forwood* (1876) 1 App. Ca. 256, per Lord Penzance at p. 272. *Cp. Hamlyn & Co. v. Wood & Co.*

There is a class of cases in which an agent for sale, having proceeded far enough in the transaction to be entitled to commission on its completion, has been deprived of his commission by the principal putting an end to the whole matter. But these cases do not depend on the rule here laid down, or on any rule peculiar to the law of agency. They are examples of the rule that one party to a contract must not prevent another from performing his part (ss. 53, 67, pp. 313, 372, above), or "each party is entitled to the full benefit of his contract without hindrance from the other" (f). See further the commentary on s. 219, p. 718, below.

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205-206

206.—Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the Agent, as the case may be, must be made good to the one by the other [S. A. § 478].

Notice of
revocation or
renunciation.

An authority given by two or more principals jointly may be determined by notice of revocation or renunciation being given by or to any one of the principals (g).

Revocation and
renunciation may
be expressed or
implied.

207.—Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

Illustration.

A. empowers B. to let A.'s house. Afterwards A. lets it himself. This is an implied revocation of B.'s authority. [S. A. § 474.]

208.—The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

When termina-
tion of agent's
authority takes
effect as to agent,
and as to third
persons.

[1831] 2 Q. B. 488, C. A. (not a case of agency). B. N. S. 733. See the judgment of Willes, J.

(f) *Prickett v. Badger* (1856) 1 C. B. N. S. 296; *Inchbald v. Western Netherland* (1817) 2 Stark. 50; 19 R. R. 675.
(g) *Bristol v. Taylor* (1817) 2 Stark. 50; 19 R. R. 675.
Gherry Coffee, etc., Co. (1864) 17 C.

B. 208.

Illustrations.

(a) A. directs B. to sell goods for him, and agrees to give B. 5 per cent. commission on the price fetched by the goods. A. afterwards, by letter, revokes B.'s authority. B., after the letter is sent, but before he receives it, sells the goods for 100 rupees. The sale is binding on A., and B. is entitled to five rupees as his commission.

(b) A., at Madras, by letter, directs B. to sell for him some cotton lying in a warehouse in Bombay, and afterwards, by letter, revokes his authority to sell, and directs B. to send the cotton to Madras. B., after receiving the second letter, enters into a contract with C., who knows of the first letter, but not of the second, for the sale to him of the cotton. C. pays B. the money, with which B. absconds. C.'s payment is good as against A.

(c) A. directs B., his agent, to pay certain money to C. A. dies, and D. takes out probate to his will. B., after A.'s death, but before hearing of it, pays the money to C. The payment is good as against D., the executor.

Time from which revocation operates.—"Revocation by the act of the principal takes effect as to the agent from the time when the revocation is made known to him; and as to third persons when it is made known to them, and not before": S. A. § 470.

Except as to Illustration (c), which removes an anomaly, this section is in accordance with the common law. Where A. trades as B.'s agent with B.'s authority (even though the business be carried on in A.'s name, if the agency is known in fact), all parties with whom A. makes contracts in that business have a right to hold B. to them until B. gives notice to the world that A.'s authority is revoked; and it makes no difference if in a particular case the agent intended to keep the contract on his own account (*h*).

Illustration (c) follows the rule of the Roman law and systems derived from it against the English authorities, which are admitted to be unsatisfactory (*i*). Accordingly an acknowledgment of a debt

(b) *Trueman v. Loder* (1840) 11 A. & E. 589; 52 R. R. 451.

(i) In England the principal's estate is not liable on the contract, but perhaps may be liable for actual loss: *Drew v. Nunn* (1879) 4 Q. B. Div. 616; *Blades v. Free* (1829) 9 B. & C. 167; 32 R. R. 620; but the agent is liable on implied

warranty of authority: *Yonge v. Toynbee* [1910] 1 K. B. 215 C. A. Nor can the agent recover agreed remuneration from the principal's estate for service in the business of the agency performed after the principal's death: *Campanari v. Woodburn* (1854) 15 C. B. 400; 100 R. R. 406.

**TERMINATION OF AGENCY BY PRINCIPAL'S DEATH OR 699
INSANITY.**

8a.
208-210

made by an agent, though after the death of the principal, binds the estate of the principal provided the creditor has no knowledge at the time of the death of the principal and the acknowledgment amounts to a "reasonable step [taken by the Agent] for the protection and preservation" of the assets of the principal within the meaning of s. 209 (j).

If the authority of an agent to admit execution of a document is revoked before the registration thereof, but such revocation is not known either to the grantee of the document or the registering officer, the document is not invalidated, though it is registered by the agent after the revocation of his authority (k).

209.—When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Agent's duty on termination of agency by principal's death or insanity.

* See S. A. §§ 491, 492. There does not seem to be any English authority.

An agency is terminated under s. 201 by the death of the principal. If the agent thereafter continue in service of the principal's heirs, a new agency is created. There is nothing in this section to indicate that the agency continues on the old terms (l). See notes to s. 208 above.

210.—The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

Termination of sub-agent's authority.

As a general rule this is obvious. There may be cases where a substitute rather than a sub-agent has been appointed, and there appears by express agreement or by the nature of the case

(j) *Ebrahim Haji Yakub v. Chunilal* (1902) 30 Cal. 265.
 (1911) 35 Bom. 302. (l) *Madhusudan v. Rakhal Chandra*
 (k) *Mohendra Nath v. Kali Proshad* (1916) 43 Cal. 248, 254-255.

Ss. an intention that his authority shall not be determined when that
210, 211. of the original agent is revoked : S. A. § 469.

Agent's Duty to Principal.

211.—An agent is bound to conduct the business of his principal according to the directions given by the principal or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

Illustrations.

(a) A., an agent engaged in carrying on for B. a business, in which it is the custom to invest from time to time, at interest, the moneys which may be in hand, omits to make such investment. A must make good to B. the interest usually obtained by such investments.

(b) B., a broker, in whose business it is not the custom to sell on credit, sells goods of A. on credit to C., whose credit at the time was very high. C., before payment, becomes insolvent. B. must make good the loss to A.

Additional Illustrations.

(c) An agent, instructed to warehouse goods at a particular place, warehouses a portion of them at another place, where they are destroyed, without negligence. He is liable to the principal for the value of the goods destroyed. [*Lilley v. Doubleday* (1881) 7 Q. B. D. 510.]

(d) An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value, in the event of their being lost. [*Smith v. Lascelles* (1788) 2 T. R. 187 ; 1 R. R. 457.]

(e) A broker, entrusted with goods for sale, sells them by auction at an inadequate price, not having made an estimate of the value in accordance with the custom of the particular trade. He must make good the loss. [*Solomon v. Barker* (1862) 2 F. & F. 926 ; 121 R. R. 828.]

(f) An auctioneer, contrary to the usual custom, takes a bill of exchange in payment of the price of goods sold. He is liable to the principal for the amount of the bill in the event of its being dishonoured. [*Ferrers v. Robins* (1835) 2 C. M. & R. 152.] S. 211.

Departure from instructions.—In *Bostock v. Jardine* (m) the defendants were authorised to buy a certain quantity of cotton for the plaintiff. “Instead of complying with their instructions, they bought a much larger quantity for the plaintiff and divers other people,” so that there was no contract on which the plaintiff could sue as principal. Accordingly, “though a contract was made, it was not the contract the plaintiff authorised the defendants to make,” and the plaintiff was entitled to recover back a sum paid to the defendants on account of the purchase-money. In an old equity case where a landowner’s steward was also lessee of part of the property, and in that capacity had made profitable arrangements with adjacent owners, it was held “that the benefit he had got as lessee by the use of the property should, upon reasonable terms, be acquired for his landlord and not for himself” (n).

It is not an agent’s duty to obey instructions which are unlawful. If, at a sale by auction without reserve, the auctioneer is instructed not to sell for less than a certain price, he is not liable to the principal for accepting the highest *bonâ fide* bid, though it may be lower than that price (o).

“If any loss be sustained.”—Where an agent sells his principal’s goods in breach of his duty below the limit placed upon them by the principal, the measure of damages is the actual loss which the principal has sustained, and not the difference between the price at which they are sold and the limit of price placed on the goods. Where no loss is suffered, the principal is entitled at least to nominal damages, the sale being wrongful (p).

The measure of damages where an agent, who had been instructed not to part with the possession of certain goods until they were

(m) (1865) 3 H. & C. 700.

395.

(n) *Beaumont v. Boulbee* (1802) 7 Ves. 599, 608.

(p) *Manchubhai v. Tod* (1894) 20 Bom. 633; *Chelapathi v. Surayya*

(o) *Bexwell v. Christie* (1776) Cowp.

(1902) 12 M. L. J. 375.

8. 211. paid for, parted with them without payment, was held to be the value of the goods, the purchaser having failed to pay the price (q).

As to the duty to account for profits, see s. 216 and commentary thereon.

Custom of trade.—According to the custom of trade in Bombay, when a merchant requests or authorises a firm to order and to buy and send goods to him from Europe, at a fixed price, net free godown, including duty, or free Bombay harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer. And it does not make any difference that the firm receives commission or trade discount from the manufacturer, either with or without the knowledge of the merchant (r).

Usage of the Bombay Market known as the *pakki adat* system.—The following are the incidents of a contract entered into on *pakki adat* terms :—

(1) The *pakka adatia* has no authority to pledge the credit of the up-country constituent to the Bombay merchant, and no contractual privity is established between the up-country constituent and the Bombay merchant.

(2) The up-country constituent has no indefeasible right to the contract (if any) made by the *pakka adatia* on receipt of the order, but the *pakka adatia* may enter into cross-contracts with the Bombay merchant, either on his own account or on account of another constituent, and thereby for practical purposes cancel the same.

(3) The *pakka adatia* is under no obligation to substitute a fresh contract to meet the order of his first constituent.

The relation between the *pakka adatia* and the up-country constituent is not the relation of agent and principal pure and simple. The precise relation may thus be described in the words of Jenkins, C.J. :—

“I think the contract between the parties was one of employment for reward, and the incidents proved appear to me to converge to the

(q) *Stearine Co. v. Heintzmann* (r) *Paul Beier v. Chotalal Javerdas*
(1864) 17 C. B. N. S. 56. (1906) 30 Bom. L.

conclusion that the contract of a *pakka adatia*, in circumstances like the present, is one whereby he undertakes or, to use the word in its non-technical sense as business men on occasion do use it, guarantees that delivery should, on due date, be given or taken at the price at which the order was accepted, or differences paid : in effect he undertakes or guarantees to find goods for cash or cash for goods or to pay the difference. S. 211.

"I do not say that there is no relation of principal and agent between the parties at any stage; there may be up to a point, and that this is legally possible is shown by Mellish, L.J., in *Ex parte White (s)*, where he speaks of 'a person who is an agent up to a certain point.' So here there may have been that relationship in its common meaning for the purpose of ascertaining the price at which the order was to be completed, and to this point of the transaction all the obligations of that relation perhaps apply. But when that stage is passed, I think the relation is not that of principal and agent, but of the nature I have indicated. Into this contract there is imported by the evidence of custom no such element of unreasonableness as would compel us to reject it on that score" (t).

Usage of the Bombay Market known as the kacchi adat system in cotton business.—Under the *kachhi adat* system, when an *adatia* receives an order from an up-country constituent for the sale or purchase of cotton, he sends for a broker and settles the rate with him. The rate so settled (u) becomes from that moment binding upon both the *adatia* and the broker, and the broker remains personally bound until he brings a party willing to take up the contract. The broker in such a case adopts one of two ways: he either procures a party willing to take up the contract and introduces him to the *adatia*, and the party and the *adatia* thus exchange *kabalas* (contracts) with each other; or, where the broker has got a contract of his own ready, he agrees to transfer it to the *adatia* and brings together the *adatia*,

(s) (1870-1871) L. R. 6 Ch. 397, at p. 403.

(t) *Bhagwandas Narotzandas v. Kanji Deoji* (1906) 30 Bom. 205, in app. from (1905) 7 Bom. L. R. 57; *Bhagwandas v. Burjorji* (1917) L. R. 45 L. A. 29, 32-33. See also *Chandulal Suklal v. Sidhruthrai*

Soojanrai (1905) 29 Bom. 291; *Kedarnath Bhuramal v. Surajmal Govindram* (1907) 33 Bom. 361.

(u) The rates are settled in consequence of constant fluctuation in the market, which may rise or fall every two minutes.

88.
211, 212.

and the other party to his (*broker's*) contract, and these two then exchange *kabalas* with each other. If, when the party is brought to the *adatia*, the market rate is the same as the rate settled by the *adatia* with the broker, the broker gets nothing beyond his commission. If the market rate is less than the rate originally settled by the broker, the difference between the two rates has to be borne by the broker and paid to the person with whom the original rate was settled. If, on the other hand, it is more, that person has to bear the difference and pay it to the broker. There is nothing unreasonable in such a usage (v).

Bombay Silver Market.—There is a custom of the Bombay Silver Market for forward contracts that only shroffs are the ostensible buyers and sellers though shroffs may have and often do have outside principals for whom they are acting. The shroffs, when acting for principals, work sometimes for *kachhi adat* and sometimes for *pakki adat*. In the case of *kachhi adat*, the *adatia* shroff guarantees the performance of the contract to the other shroff but does not guarantee its performance to his own principal. In the case of *pakki adat*, the *adatia* shroff, who then acts for a higher rate of commission, is liable as principal both to his own employer and to the other shroff. This custom whereby only shroffs are the ostensible parties is observed for two reasons agreeable to the Marwari shroffs : first, that on every forward silver transaction a commission becomes payable to one or both of the Marwari shroffs ; and, secondly, that the *adatia* shroff guarantees to the other shroff performance of the contract. There is no such custom, however, that the selling shroff is not personally liable to the principal of the buying *adatia*. Thus if A. enters into a contract in the name of his *kachha adatia* H. whereby H. agrees to buy and S. agrees to sell silver bars for the ensuing *voida*, A. is entitled to demand performance of the contract from S (w).

212.—An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with

Skill and
diligence required
from agent.

(v) *Fakirchand Lalchand v. Doolub* (w) *Abraham v. Sarupchand* (1917)
Gorindji (1905) 7 Bom. L. R. 213. 42 Bom. 224.

reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct. S. 212

Illustrations.

(a) A., a merchant in Calcutta, has an agent, B., in London, to whom a sum of money is paid on A.'s account, with orders to remit. B. retains the money for a considerable time. A., in consequence of not receiving the money, becomes insolvent. B. is liable for the money and interest from the day on which it ought to have been paid, according to the usual rate, and for any further direct loss, as, e.g., by variation of rate of exchange, but not further.

(b) A., an agent for the sale of goods, having authority to sell on credit, sells to B. on credit, without making the proper and usual inquiries as to the solvency of B. B., at the time of such sale, is insolvent. A. must make compensation to his principal in respect of any loss thereby sustained.

(c) A., an insurance broker, employed by B. to effect an insurance on a ship, omits to see that the usual clauses are inserted in the policy. The ship is afterwards lost. In consequence of the omission of the clauses nothing can be recovered from the underwriters. A. is bound to make good the loss to B.

(d) A., a merchant in England, directs B., his agent at Bombay who accepts the agency, to send him 100 bales of cotton by a certain ship. B., having it in his power to send the cotton, omits to do so. This ship arrives safely in England. Soon after her arrival, the price of cotton rises. B. is bound to make good to A. the profit which he might have made by the 100 bales of cotton at the time the ship arrived, but not any profit he might have made by the subsequent rise.

Cp. S. A. §§ 183, 185, 191, 217, 220, 221 : "When a skilled labourer, artisan, or artist is employed, there is, on his part, an implied warranty that he is of skill reasonably competent to the art he undertakes. An express promise or express representation in the particular case is not necessary. . . . The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and therefore misconduct." And the employer is justified in dismissing an employee who shows himself incompetent,

§§. 212, 213. though he may have been engaged for a term not expired (x). But the obligation of diligence may be waived by express agreement (y). On the other hand, any express undertaking or guarantee by the agent will bind him according to its terms; and an agreement exempting an agent from the consequences of his own fraud or wilful wrong seems on principle to be void (S. A. § 188). An agent is bound to know so much of the law material to the business in hand as will enable him to protect the principal's interest, and make the transaction binding on the other party (z). Every person acting as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties (a). It is not enough for him to rely and act upon the statements of other persons: *S'arampur Coal Co. v. Colley* (1908) 13 Cal. W. N. 59. But an agent who is definitely authorised to enter into a particular transaction is not liable to the principal for any loss which may be suffered in consequence of the imprudent nature of the transaction (b); nor is he liable for the consequences of a mere mistake or error of judgment provided he exercises such care and skill as may be reasonably expected under the circumstances (c).

Gratuitous Agent.—A gratuitous agent is liable for any loss sustained by his principal through the gross negligence of the agent (d). Gross negligence may be defined as the omission by the agent to exercise such skill as he actually has (e), or has held himself out to have (f), and such care and diligence as he is in the habit of exercising with regard to his own affairs (g).

Agent's accounts.

213.—An agent is bound to render proper accounts to his principal on demand.

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| (x) <i>Harmer v. Cornelius</i> (1858) 5 C. B. N. S. 236; 116 R. R. 654, <i>Cur. per Willes, J.</i> | (c) <i>Lagunas Nitrate Co. v. Lagunas Syndicate</i> [1899] 2 Ch. 392; |
| (y) <i>Austin v. Manchester, etc., Ry. Co.</i> (1850) 10 C. B. 454; 84 R. R. 645. | (d) <i>Agnew v. Indian Carrying Co.</i> (1865) 2 M. H. C. 449. |
| (z) <i>Park v. Hammond</i> (1816) 6 Taunt. 495; 16 R. R. 658; <i>Neilson v. James</i> (1892) 9 Q. B. Div. 516. | (e) <i>Wilson v. Brett</i> (1843) 11 M. & W. 113; 63 R. R. 528. |
| (a) <i>Lee v. Walker</i> (1872) L. R. 7 C. P. 121; <i>Jenkins v. Betham</i> (1855) 15 C. B. 168. | (f) <i>Real v. South Devon Ry. Co.</i> (1864) 3 H. & C. 377. |
| (b) <i>Overend v. Gibb</i> (1872) L. R. 5 H. L. 480. | (g) <i>Shields v. Blackburne</i> (1789) 1 H. Bl. 159; 2 R. R. 750; <i>Moffatt v. Bateman</i> (1869) L. R. 3 P. C. 115; <i>Giblin v. McMullen</i> (1869) L. R. 2 P. C. 317. |

Agent's duty to account.—This duty is elementary, and will be enforced at need by following in the agent's hands property representing money for which he ought to have accounted (*h*). It is irrespective of any contract to that effect. It is not discharged by merely delivering to the principal a set of written accounts without attending to explain them and produce the vouchers by which the items of disbursement are supported (*i*). If an agent neglects to keep proper accounts, everything consistent with established facts will be presumed against him in the event of his being called upon for an account of the agency (*j*). S. 213.

The duty to account is owed by the agent to the principal, and not to other persons. Thus an agent appointed by the administrator of the estate of a deceased person to recover outstanding debts due to the estate is not liable to account on the contract of agency to the person entitled to the estate, and it makes no difference that representation was granted to the administrator as attorney of the mother and guardian of the person entitled to the estate (*k*).

When a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian, and advances have been applied for the benefit of the minor the agent ought to be allowed these advances in taking the accounts. Here the plaintiff seeks relief from a Court administering equity, and he must do equity himself (*l*).

As to the form of a suit for an account between a principal and an agent, see the undermentioned cases (*m*). A suit by a principal against his agent for an account, and also for recovery of money that may be found due from him, is governed by art. 89, sch. 11, of the Limitation Act (*n*).

(*h*) *Chedworth v. Edwards* (1802) 8 Ves. 46; 6 R. R. 212.

(*i*) *Ananda Persad v. Dwarknath* (1881) 6 Cal. 754. See also *Lawless v. Calcutta Landing and Shipping Co.* (1881) 7 Cal. 627; *Ramchunder v. Manick Chunder* (1881) 7 Cal. 428; *Shib Chunder v. Chunder Narain* (1905) 32 Cal. 719; *Ram Das v. Bhagwat Das* (1904) 1 All. L. J. 347; *Madhusudan v. Rakhal* (1916) 43 Cal. 248, 259-260.

(*j*) *Gray v. Haig* (1854) 20 Beav.

219; 109 R. R. 396.

(*k*) *Chidambaram Chetti v. Pichappa Chetti* (1907) 30 Mad. 213. The suit in this case was founded on the contract of agency.

(*l*) *Surenbra Nath Sarbar v. Atul Chandra Roy* (1907) 31 Cal. 892.

(*m*) *Degamber v. Kallynath* (1881) 7 Cal. 654; *Hurriath v. Krishna* (1887) 14 Cal. 147.

(*n*) *Shib Chandra Roy v. Chandra Narain Muterjee* (1905) 32 Cal. 719.

8a.
213-215.

Where an agent enters into a contract with a third person in his own name, and subsequently sues on the contract and obtains a decree, the principal is not entitled to maintain a suit for a declaration that he is beneficially interested in the decree and to recover the amount thereof from the judgment-debtor. The fact that the principal is entitled to an amount from the agent does not entitle him to maintain a suit of this kind. He could have adopted the contract and sued on it himself; after a decree is passed for the agent, he is too late (*o*).

See also the commentary on s. 218, p. 716, *post*.

Liability of representative of agent to account.—The legal representative of an agent cannot be called upon to render accounts to the principal in the same sense as the agent himself. The remedy of the principal is to sue the representative for any loss he may have suffered by reason of the negligence or misconduct of his agent. In other words, the suit is not one for accounts strictly so called, but a suit for money payable to the principal out of the estate of the agent (*p*).

214.—It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

Agent's duty to communicate with principal.

There does not appear to be any reported authority in point on this section. Obviously the rule must be as stated.

215.—If an agent deals on his own account in the business of the agency, without first obtaining the consent of his principal and acquainting him with all material circumstances which have come to his own knowledge on the subject, the principal may repudiate the transactions, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

Right of principal when agent deals, on his own account in business, of agency without principal's consent.

(*o*) *Golhanram v. Jaharmull* (1913) 40 Cal. 335.

(*p*) *Kumeda Charan v. Asutosh Chattopadhyaya* (1912) 17 Cal. W. N. 5

Illustrations.

S. 215.

(a) A. directs B. to sell A.'s estate. B. buys the estate for himself in the name of C. A., on discovering that B. has bought the estate for himself, may repudiate the sale, if he can show that B. has dishonestly concealed any material fact, or that the sale has been disadvantageous to him.

(b) A. directs B. to sell A.'s estate. P., on looking over the estate before selling it, finds a mine on the estate which is unknown to A. B. informs A. that he wishes to buy the estate for himself, but conceals the discovery of the mine. A. allows B. to buy in ignorance of the existence of the mine. A., on discovering that B. knew of the mine at the time he bought the estate, may either repudiate or adopt the sale at his option.

Authoritative illustrations of the principle here laid down might be multiplied almost indefinitely from the English reports. A few will suffice for all useful purposes. The kind of case given in Illustration (a) is the most common subject of animadversion, but there is no doubt that the rule is general. "Where an agent employed to sell becomes himself the purchaser, he must show that this was with the knowledge and consent of his employer, or that the price paid was the full value of the property so purchased; and this must be shown with the utmost clearness and beyond all reasonable doubt" (q).

"It is an axiom of the law of principal and agent that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy become himself the seller, without distinct notice to the principal, so that the latter may object if he think proper" (r).

For like reasons an agent for sale or purchase must not act for the other party at the same time, or take a commission from him unknown to the principal (s). An agent must give his principal "the free and unbiassed use of his own discretion and judgment" (t).

A principal who seeks to set aside a transaction on the ground that the provisions of the section have been violated must take

(q) Lord Lyndhurst, *Charter v. Trevelyan* (1844) 11 Cl. & F. at p. 732; 65 R. R. at p. 315.

(r) Willes, J., in *Mollett v. Robinson* (1870) L. R. 5 C. P. at p. 655. Local usage of a trade or market contravening the general rule is not binding on a principal not proved to have known it.

See S. C. in H. L. (1874) L. R. 7 H. L. 802.

(s) *Grant v. Gold Exploration, etc., Syndicate of British Columbia* [1900] 1 Q. B. 233, is a recent example.

(t) *Clarke v. Tipping* (1848) 9 Beav. 284, 292; 73 R. R. 355, 361.

ss. 215, 216. proceedings for that purpose within a reasonable time after becoming aware of the circumstances relied on (u).

English authorities do not recognise the qualifications added at the end of this section (v), and it does not appear why it was thought necessary to add them. The English doctrine may be thought to have been affected by the well-known severity of Courts of Equity towards trustees, and to be in excess of a reasonable standard of ordinary commercial justice. In fact, the special provisions of the Trusts Act, ss. 51—54, are more stringent.

216.—If an agent, without the knowledge of his principal, deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction.

Principal's right to benefit gained by agent dealing on his own account in business of agency.

Illustration.

A. directs B., his agent, to buy a certain house for him. B. tells A. it cannot be bought, and buys the house for himself. A. may, on discovering that B. has bought the house, compel him to sell it to A. at the price he gave for it.

Additional Illustration.

A., acting as B.'s agent, agrees with C. for the sale to him of fifty maunds of grain for future delivery. A. delivers his own grain to C. as against the contract. Subsequently he receives grain from B. for delivery to C. under the contract, which he sells in the market at a profit. B. may, on discovering these facts, claim the profit from A. [*Damodar Das v. Sheoram Das* (1907) 29 All. 730.]

Principal's right to profits.—“It may be laid down as a general principle that in all cases when a person is, either actually or constructively, an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are

(u) *Wentworth v. Lloyd* (1864) 10 H. L. Cas. 599.

(v) *Ex parte Lacey* (1802) 6 Ves. 625; 6 R. R. 9, 11.

to be for the benefit of his employers": S. A. § 211, adopted by the Court of Queen's Bench (*w*). "If a person, while holding a fiduciary position and acting in that capacity, makes a profit without fully disclosing his interest to those persons towards whom he stands in such a position he must account to them for that profit" (*x*); and it is immaterial that in acquiring the profit the agent may have run the risk of loss (*y*), and that the principal may have suffered no injury (*z*). Accordingly, if an agent for sale receives a share of commission or extra profit from the buyer's agent without the knowledge of his own principal, the principal can recover the sum of money received to his use (*a*). The principal can also recover from the agent and from the person who bribed him under the name of commission or otherwise, jointly and severally, damages for any loss sustained by the principal by reason of entering into the contract, *e.g.*, an addition fraudulently made to the price of goods bought through the agent in order to give the agent a secret profit. Recovery of the illicit profit from the agent is no bar to an action for further damages against the third person (*b*). The relation which arises in such cases between the agent in default and the principal is that of debtor and creditor, not of trustee and beneficiary (*c*). The ordinary law of limitation is applicable, the time running from the principal's discovery of the facts (*d*), and the special rules as to following trust money into its investments do not apply (*e*). But interest is recoverable on bribes from the date of their receipt (*e*).

Where an agent has in effect bought from his principal, a subsequent purchaser from the agent with knowledge of the

(*w*) *Morison v. Thompson* (1874) 1 P. C. 352.

L. R. 9 Q. B. 480, 485.

(*z*) *Parker v. McKenna* (1874) L. R.

10 Ch. 96.

(*x*) *Stirling, L. J., Costa Rica R. Co.*

v. Forewood [1901] 1 Ch. 746, 766. In

the particular case the plaintiff company was held to have no right to complain of one of its directors having made profit out of a contract with the company, partly because of a special provision in the articles of association and partly because the company was in substance informed of all the material facts.

(*a*) *Ib.*, note (*w*) above.

(*b*) *Mayor of Salford v. Lever* [1891] 1 Q. B. 168, C. A.

(*c*) *Lister & Co. v. Stubbs* (1890) 45 Ch. Div. 1; *Powell v. Jones* [1905] 1 K. B. 11.

(*d*) *Metropolitan Bank v. Heiron* (1880) 5 Ex. Div. 319.

(*e*) *Nant-y-glo Iron Co. v. Grase* (1878) 12 Ch. D. 728; *Pearson's Case* (1877) 5 Ch. Div. 336.

(*y*) *Williams v. Stevens* (1866) L. R.

S. 216. agency is in no better position against the principal than the agent himself (f).

Forfeiture of Commission.—An agent who has wrongfully dealt on his own account is obviously not entitled to recover any commission for the transaction, even if the principal adopts it, for the principal could forthwith recover it back from him under this section or the equivalent common law rule. Moreover, he had no authority to make a contract with himself, and therefore has earned nothing as agent (g). The principal's option of ratifying the unauthorised transaction does not give the agent any better right.

Knowledge of Principal.—A transaction of this kind may be approved or ratified by the principal (h), but it must be upon full disclosure. It is not enough for the agent to tell the principal that he has some interest of his own. He must disclose all material facts, and be prepared to show that full information was given and the agreement made with perfect good faith. Notice sufficient to put the principal on inquiry will not do (i). Thus where an agent employed to buy goods sells his own goods to the principal at a price higher than the prevailing market rate, the principal is entitled to repudiate the transaction, and he is not bound by a ratification made in the absence of knowledge that the agent was selling his own goods and was charging him in excess of the market price (j).

It is open to the principal whose agent has bargained for a secret profit or commission to adopt the transaction, if he thinks fit, for the purpose of suing the third party and recovering for himself the sum promised by him to the agent, or any part of it which the agent has not received (k).

Profit not acquired in course of agency.—It has been held by the Court of Appeal that an agent who, without disclosure, sells to his

(f) *Molony v. Kernan* (1842) 2 Dr. & W. 31; 59 R. R. 635.

(g) *Salomons v. Pender* (1865) 3 H. & C. 639; *Jochinson v. Meghjee Vallabhdas* (1909) 34 Bom. 292.

(h) *Re Haslam* [1902] 1 Ch. 765.

(i) *Jessel, M.R., Dunne v. English*

(1871) L. R. 18 Eq. 524, 533—536, citing and approving earlier authorities;

Gluckstein v. Barnes [1900] A. C. 240.

(j) *Damodar Das v. Sheoram Das* (1907) 29 All. 730.

(k) *Whaley Bridge Printing Co. v. Green* (1879) 5 Q. B. D. 109.

principal goods which were the property of the agent prior to the commencement of the agency is not, in the absence of misrepresentation (l), liable to account for the profit made by him or for the difference between the contract price and the market value, even if the remedy of rescission is not open to the principal owing to its having become impossible (m). This decision, though obviously open to criticism, has been approved by the Judicial Committee of the Privy Council in a case (n) where a director of a company purchased property on his own account, and subsequently sold it to the company at a higher price without disclosing the profit.

Unauthorised profits of Agents.—An agent is liable to refund to the principal the amount of "return commission" received by him from his sub-agent (o).

Payments authorised by Custom.—The law of the present section does not interfere with the customary mode of remunerating an agent, in certain branches of business, by a discount or percentage which is ultimately paid by the third party and not by his own principal. Here the agent's position is almost that of an officer of a market paid by a toll on the goods dealt with. Such allowances are constant in brokerage and insurance business and are so well known that no special consent on the principal's part is needed to cover them. They are included in the agent's general authority to do business in the usual manner. "If a person employs another, who he knows carries on a large business, to do certain work for him, as his agent with other persons, and does not choose to ask him what his charge will be, and in fact knows that he is to be remunerated, not by him, but by the other persons—which is very common in mercantile business—and does not choose to take the trouble of inquiring what the amount is, he must allow the ordinary

(l) As to misrepresentation, see *In re Leeds, etc., Theatre of Varieties* [1902] 2 Ch. 809.

(m) *In re Cape Breton Co.* (1884) 29 Ch. Div. 795. And see *Ladywell Mining Co. v. Brookes* (1887) 35 Ch. Div. 409.

(n) *Burland v. Earle* [1902] A. C. 33.

(o) *Mayen v. Alston* (1892) 16 Mad.

238, 265, 267. Cp. *Rossiter v. Walsh* (1843) 4 Dr. & W. 485; 65 R. R. 745, a peculiar case of an improvident lease by an agent to a sub-agent of the same principals, where, the agent not being in fact empowered by all the principals, Sir E. Sugden saw his way to set the lease aside.

§. 216. amount which agents are in the habit of charging (p). These charges being allowed on a fixed scale to all persons employed in that kind of business alike, and notorious, are not obnoxious to the rule against secret profits and corrupt allowances.;

Agreements against agent's duty void.—An agreement between an agent and a third person which comes within the terms of the present section, or in any way puts the agent's interest in conflict with his duty, is not enforceable unless the principal chooses to ratify it. Where a *mehla* (clerk), without the knowledge of his master, agreed with his master's brokers to receive a percentage, called *sucra*, on the brokerage earned by them in respect of transactions carried out through them by the *mehla*'s master, and no express consideration was alleged or proved by the *mehla*, the Court refused to imply as a consideration an agreement by the *mehla* to induce his master to carry on business through those brokers, and was of opinion that such an agreement would be inconsistent with the relation of master and servant. Westrop, J., said: "To support such an agreement would be against the policy which should regulate the relation of master and servants, and would be subversive of that relation, as such an arrangement would render it the interest of the servant to connive at conduct of the parties with whom his master deals which the servant ought to be vigilant to expose and to check. . . Could any one contend that the butler of a gentleman here or in London could maintain a suit against a tradesman for a percentage on his master's purchases, supposing an agreement to that effect? It would be against all policy; it would place the servant in a position inconsistent with the duty which he owes to his master" (q).

An agreement whereby the defendant agreed to remunerate an executor appointed under her brother's will out of her own pocket for undertaking the duties of executor, which he declined to do without remuneration, does not create such an interest at variance with the duties imposed upon executors as to render the agreement illegal on the ground of public policy (r). The Court said (s): "It has, however,

(p) *Great Western Insurance Co. v. Cunliffe* (1874) L. R. 9 Ch. 525, 540; (r) *Narayan Coomari Debi v. Shajani Baring v. Stanton* (1876) 3 Ch. Div. 502. *Kanta Chatterjee* (1894) 22 Cal. 14, cited at pp. 161, 193, ante.

(q) *Vinayakrav v. Ransordas* (1870) (s) *Ib.*, pp. 20, 21.

been strongly contended before us that the present contract is against public policy, because it creates an interest at variance with a duty (see *Egerton v. Earl Brownlow*, 4 H. L. C. 1, 250); that is to say, if the plaintiff be remunerated for his services there will be an inducement for him to neglect his duties and to prolong the administration instead of acting with care and diligence. We think that there is much force in this contention, but at the same time, although an agreement of this character may appear to some extent for the above reason to be opposed to public policy, we are not prepared to hold that such an agreement is necessarily unlawful. We think it should be borne in mind that if a sole executor, or where there is more than one all the executors, renounced, the estate of the testator might go unadministered unless the executor or executors undertook to accept office on receipt of remuneration from a third person, and it is quite possible that more public mischief and inconvenience might be occasioned by the estate remaining unadministered than by rewarding an executor for administering it. In the present case it seems to be quite clear upon the evidence that Shajani Kanta would not have taken upon himself the duty of executor unless he was remunerated, and we are not prepared to say that under the circumstances the agreement entered into between him and the Maharani was unlawful." 84 216,

217.—An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent.

Agent's right of retainer out of sums received on principal's account.

The right conferred in terms by this section is in the nature of retainer, and assumes the agent to have money for which he is accountable to the principal in his hands or under his control. S. 221 (p. 721, below) further gives the agent a possessory lien on the principal's property in his custody. Nothing in the Act expressly gives him an equitable lien, i.e., a right to have his claims satisfied, in priority to general creditors, out of specific funds of the principal which are not under his control. Such a right, however, may exist in particular

56. 218. cases. In the special case of a solicitor it is well settled that a judgment which he has obtained for his client by his labour or his money should stand, so far as needful, as security for his costs, and he is entitled to have its proceeds pass through his hands. The Court will not allow any collusive arrangement between parties to deprive the solicitor of this benefit (t). But intention to defraud the successful party's solicitor is not presumed from the mere fact of the action being settled without his assistance (u). It seems doubtful, however, whether this rule can properly be regarded as having anything to do with the general law of agency, and therefore whether it can furnish any safe guidance for our present purpose.

Though an agreement entered into between a pleader and his client respecting his remuneration may be void under the provisions of s. 28 of the Legal Practitioners Act, 1879, if it is not reduced to writing and filed in court, the pleader does not, by reason of that fact, lose his right under the present section to retain disbursements made by him on his client's behalf out of the sums that may be received by him on account of his client in the case (v).

The language of this section is not very well fitted to cover damages and costs for which the principal may be liable to indemnify the agent under s. 222, but it is hardly possible to suppose that it would not be held to do so.

Pakki Adat.—A *pakka adatia* is entitled to the charges of remitting to the constituent the profits made by him on the constituent's behalf, as an agent is under this section (w).

Business.—The word "business" in this section means the same business or a continuing business. Hence money received by an agent in one business cannot be retained by him on account of remuneration alleged to be due to him in a different business altogether which had long since been completed (x).

218.—Subject to such deductions, the agent is bound

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| Agent's duty to pay sums received for principal. | to pay to his principal all sums received on account. |
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| (t) <i>Ex parte Morrison</i> (1868) L. R. 4 Q. B. 153, 156. See <i>Cullianji Sangjibhoy v. Raghovji Vijpal</i> (1906) 30 Bom. 27. (u) <i>The "Hope"</i> (1883) 8 P. D. 144. (v) <i>Subba Pillai v. Ramasami Ayyar</i> | (1903) 27 Mad. 512. (w) <i>Kedarmal Bhuramal v. Surajmal Govindram</i> (1907) 33 Bom. 364. (x) <i>Sardar Muhammad v. Eabu Das-wandhi</i> (1885) Punj. Rec. no. 49. |
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Mode of payment.—It follows from this rule that an agent to receive money has generally no authority to receive anything else as equivalent. As between the principal and a third person, a set-off or balance of account between that person and the agent in his own right is not a good payment to the agent on behalf of the principal. The debtor "must pay in such a manner as to facilitate the agent in transmitting the money to his principal" (y). It seems that an alleged custom to the contrary cannot be sustained. If money is paid to an agent on his principal's account by a person who is also indebted to the agent personally, the agent is not entitled to appropriate the money to his own debt, but must pay it over to the principal (z). Nor is an agent who has received money on the principal's account entitled to set up against the principal claims made by third persons in respect of the money (a).

Payments in respect of illegal transaction.—If an agent receive money on his principal's behalf under an illegal or void contract, the agent must account to the principal for the money so received, and cannot set up the illegality of the contract as a justification for withholding payment, which illegality the other contracting party had waived by paying the money (b). Upon this principle it has been held that an agent receiving cesses from tenants which are illegal under the Bengal Tenancy Act (c), or moneys due to the principal under a wagering contract (d), is bound under the provisions of this section to pay the same to the principal. But this rule does not apply where the contract of agency is itself illegal (e). And it is open to an agent who has received money in respect of a void transaction, or otherwise under such circumstances that he was bound to repay it, to show in an action by the principal that it has been repaid to the person from whom it was received (f).

(y) *Pearson v. Scott* (1878) 9 Ch. D. 102, 108.

(z) *Heath v. Chilton* (1844) 12 M. & W. 632; 57 R. R. 447, *Shaw v. Pictou* (1825) 4 B. & C. 715; 28 P. R. 455.

(a) *Roberts v. Ogilby* (1821) 9 Price 269; 23 R. R. 671.

(b) *Tenant v. Elliott* (1797) 1 B. & P. 3; 4 P. R. 755, and see editor's note there; *Bhola Nath v. Mal*

Chand (1903) 25 All. 639.

(c) *Najendrabala v. Gura Doyal* (1903) 30 Cal. 1011.

(d) *Bhola Nath v. Mal Chand*, *supra* note (b).

(e) *Sykes v. Beadon* (1879) 11 Ch. D. 170, per Jessel, M.R., at p. 193 *et seq.*, where the earlier cases are considered and explained.

(f) *Murray v. Mann* (1918) 2 Ex.

219.

219.—In the absence of any special contract, payment

When agent's
remuneration
becomes due.

for the performance of any act is not due to the agent until the completion of such act ;

but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

“Special Contract”.—When there is an express contract providing for the remuneration of the agent, the amount of the remuneration and conditions under which it becomes payable must primarily be ascertained from the terms of that contract (*g*). No other contract inconsistent therewith, whether founded on custom or usage or otherwise can be implied ; but evidence of a particular usage may be given for the purpose of incorporating provisions that are not inconsistent with the terms of the express contract (*g*). In the absence of an express contract, the right to remuneration and conditions under which it is payable are held in English law to depend on the custom or usage of the particular business in which the agent is employed (*h*). It would probably be held that the same principle applies in India, and that the words “special contract” in this section include a contract arising by implication from custom or usage.

“Completion of such act.”—“The question whether or not an agent is entitled to commission has repeatedly been litigated and it has

538 ; 76 R. R. 686 ; *Shee v. Clarkson* N. S. 638 ; 125 R. R. 824 ; *Parker v.* (1810) 12 East, 507 ; 11 R. R. 473. *Ibbetson* (1858) 4 C. B. N. S. 346 ; 114 R. R. 752 ; *Clack v. Wood* (1882) 9 Q. B. D. 276.

(*h*) *Rend v. Renn* (1830) 10 B. & C. 438 ; 34 R. R. 473 ; *Broad v.*

(*g*) *Green v. Mules* (1861) 30 L. J. C. P. 343 ; 126 R. R. 894 (if it is agreed that commission shall be payable only in the event of success, the agent cannot claim a *quantum meruit* in the absence of success) ; *Cutler v. Powell* (1795) 6 T. R. 320 ; 3 R. R. 185 ; *Wilde v. Stuart* (1856) 1 C. B. N. S. 88 ; 107 R. R. 582 ; *Fullbrook v. Akerman* (1862) 11 C. B. N. S. 737 ; 132 R. R. 735 ; *Biggs v. Gordon* (1860) 8 C. B. N. S. 638 ; 125 R. R. 824 ; *Parker v.* (1810) 12 East, 507 ; 11 R. R. 473. *Ibbetson* (1858) 4 C. B. N. S. 346 ; 114 R. R. 752 ; *Clack v. Wood* (1882) 9 Q. B. D. 276. (*h*) *Rend v. Renn* (1830) 10 B. & C. 438 ; 34 R. R. 473 ; *Broad v. Thomas* (1830) 7 Bing. 99 ; 33 R. R. 399 (custom of City of London by which shipbrokers entitled to commission only in the event of completion of contracts negotiated by them held to exclude any claim, even for *quantum meruit*, in respect of a contract not completed, though the non completion was owing to the act of the principal) ; *Baring v. Stanton* (1876) 3 Ch. D. 502.

usually been decided that, if the relation of buyer and seller is really brought about by the act of the agent, he is entitled to commission, although the actual sale has not been effected by him" (i). In other words, the commission becomes due if the broker has induced in the party for whom he acts the contracting mind, the willingness to open negotiations upon a reasonable basis (j). And the right to brokerage is not lost even though a change or modification of the terms of the contract is made between the buyer and seller without the intervention of the broker (k). A broker employed to procure a loan on property becomes entitled to his commission if he finds a party willing to advance the money, even "if the contract were afterwards to go off from the caprice of the lender, or from the infirmity of the title" (l). Whether the other party to the contract ultimately formed has been brought into relation with the principal by means of the agent's intervention is a question of fact. It is not necessary to establish his claim that he should have been the other party's first or sole source of information (m). But in order to establish a claim for commission the agent must show that the transaction in respect of which the claim is made was a direct result of his agency (n). It is not sufficient to show that the transaction would not have been entered into but for his introduction. He must go further, and show that his introduction was the direct cause of the transaction (o).

Agent prevented from earning remuneration.—If, in breach of a contract, express or implied, with an agent, the principal, by refusing to complete a transaction or otherwise, prevents the agent from

(i) Per Erle, C.J., in *Green v. Bartlett* (1863) 14 C. B. N. S. 681; 135 R. R. 868.

(j) *Municipal Corporation of Bombay v. Cuverji Hirji* (1895) 20 Bom. 124.

(k) *Wilkinson v. Martin* (1837) 8 C. & P. 1; *Mansell v. Clements* (1874) L. R. 9 C. P. 139; *Lara v. Hill* (1863) 15 C. B. N. S. 45; 137 R. R. 377, where the only dispute matter was the construction of special terms.

(l) *Green v. Lucas* (1876) 31 L. T. 731, on appeal 33 L. T. 584; *Fisher v.*

Drewitt (1878-9) 48 L. J. Ex. 32; *Elias v. Govind* (1902) 30 Cal. 202. These two English cases add nothing to the law, which was already settled.

(m) *Mansell v. Clements* (1874) L. R. 9 C. P. 139; *Jordon v. Ram Chandra Gupta* (1904) 8 C. W. N. 831.

(n) *Bray v. Chandler* (1856) 18 C. B. 718; *Gibson v. Crick* (1862) 1 H. & C. 142; 134 R. R. 425; *Tribe v. Taylor* (1876) 1 C. P. D. 595; *Antrobus v. Wickens* (1865) 4 F. & F. 291.

(o) *Tribe v. Taylor*, last note.

§s.
119, 220.

earning remuneration, the agent is entitled to damages (*p*); and in such case the measure of damages, where the agent has done all that he undertook to do, is the full amount of remuneration that he would have earned if the transaction had been duly completed, or the principal had otherwise carried out his contract (*q*). Where the authority of an agent is revoked after it has been partly exercised or after the agent has attempted to exercise it, the question whether he is entitled to a *quantum meruit* for the work previously done depends upon the terms of the contract of agency, and the custom or usage of the particular trade or business (*r*).

Express contract for remuneration.—Where the terms of remuneration are contained in a writing, the agent is not entitled to remuneration unless all conditions imposed by the writing have been fulfilled (*s*).

220.—An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

Agent not
entitled to remuneration for business
misconducted.

Illustrations.

(a) A. employs B. to recover 100,000 rupees from C., and to lay it out on good security. B. recovers the 100,000 rupees, and lays out 90,000 rupees on good security, but lays out 10,000 rupees on security which he ought to have known to be bad, whereby A. loses 2,000 rupees. B. is entitled to remuneration for recovering the 100,000 rupees and for investing the 90,000 rupees. He is not entitled to any remuneration for investing the 10,000 rupees, and he must make good the 2,000 rupees to B. [*sic* in the Act, but it should obviously be A.].

(b) A. employs B. to recover 1,000 rupees from C. Through B.'s misconduct the money is not recovered. B is not entitled to any remuneration for his services, and must make good the loss.

(*p*) *Turner v. Goldsmith* [1891] 1 Q. B. 541; *Inchbald v. Western Neilgherry, etc., Co.* (1864) 17 C. B. N. S. 733.

(*q*) *Prickett v. Badger* (1856) 1 C. B. N. S. 296; *Roberts v. Barnard* (1884) 1 C. & E. 336.

(*r*) *Queen of Spain v. Parr* (1868)

39 L. J. Ch. 73; *Simpson v. Lamp* (1856) 17 C. B. 603. The agent must show that there was a contract, express or implied to pay remuneration in such a case. The burden of proof is on him.

(*s*) *Lalljee Mahomed v. Dadabhai* (1916) 23 Cal. L. J. 190, 195.

[S. A. ss. 331—334. Negligence may disentitle an agent to recover even advances and disbursements out of pocket : *ib. s. 349.*] “ A principal is entitled to have an honest agent, and it is only the honest agent who is entitled to any commission.” Accordingly where an agent for sale, having sold the property, retained half the deposit as commission with the principal's consent, and also, without the principal's knowledge, received a commission from the buyer, the agent was held liable not only to account for the secret commission to the principal, but to return the usual commission, which he had retained (t). But an agent who retains discounts received by him from third persons, in the honest belief that he is entitled to retain them, does not thereby forfeit his commission, although he may be liable to account for the discounts as profits received without the knowledge or consent of the principal (u). And even if an agent makes fraudulent overcharges in respect of some transactions, that will not disentitle him to commission on other separate and distinct transactions in which he has acted honestly (v).

34.
220, 221.

221.—In the absence of any contract to the contrary an agent is entitled to retain goods, papers and other property, whether moveable or immoveable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

Agent's lien on principal's property.

Agent's Lien.—One practical consequence of this rule is that a buyer of property from an auctioneer, or other agent known to be in possession of the property and entitled to a lien on it, cannot set up payment to the principal as a defence to an action for the price at the suit of the agent (w). Similarly a subsequent charge given by the principal to a third person will be postponed to a factor's lien. It seems that property is sufficiently “ received ” by an agent for the purpose of this section when there has been any dealing with it

(t) *Andrews v. Ramsay & Co.* [1903] 2 K. B. 635, per Lord Alverstone, C.J., at p. 638. (v) *Nitidals Taendstikfabrik v. Bruster* [1906] 2 Ch. 671.
(u) *Hippisley v. Knee* [1905] 1 K. B. 1. (w) *Robinson v. Rutter* (1855) 4 E. & B. 954; 93 R. R. 849.

S. 221. amounting to delivery to him under s. 90 (p. 490, above) (x). An auctioneer, employed to sell furniture at the house of the owner, is sufficiently in possession of the furniture to entitle him to a lien thereon for his charges and commission (y). But a lien cannot be acquired by a wrongful act. The possession of the property, therefore, must be obtained by the agent lawfully in order that a lien, whether general or particular, may attach. If he obtains it by misrepresentations (z), or without the principal's authority (a), he has no lien thereon. Nor, where property is entrusted to an agent for a special purpose, can the agent claim any lien, the existence of which is inconsistent with such purpose (b). See further on this subject the commentary on s. 171.

The lien claimable under this section is confined to commission, disbursements, and services in respect of the specific property on which lien is claimed. Where the secretaries and treasurers of a limited company claimed a lien under this section on "goods, papers, and other property, whether moveable or immoveable," of the company in their possession for loans made on behalf of the company and for the purpose of the *whole concern*, it was held that the loans, not having been specially assigned to the property, did not constitute "disbursements and services in respect of" that property, and the agents were, therefore, not entitled to the lien claimed (c).

How far lien effective against third persons.—The lien, whether general or particular, of an agent attaches only on property in respect of which the principal has, as against third persons, the right to create a lien (d), and, except in the case of money and negotiable securities, is confined to the rights of the principal in the property at the time when the lien attaches, and is subject to all rights and equities of third

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- (x) See *Bryans v. Nix* (1839) 4 M. 61.
 & W. 775; 51 R. R. 829. (b) *Buchanan v. Findlay* (1829) 9 R. & C. 738; *Ex parte Gomez* (1875) L. R. 10 Ch. 639. See also the cases cited above, p. 644, n. (f).
 (y) *Williams v. Millington* (1788) 1 H. Bl. 81; 2 R. R. 724. 10 Ch. 639. See also the cases cited above, p. 644, n. (f).
 (z) *Madden v. Kempster* (1807) 1 Camp. 12. (c) *In re Bombay Sawmills Co., Ltd.* (1889) 13 Bom. 314, 321, 322.
 (a) *Walsh v. Provan* (1853) 8 Ex. 843; 91 R. R. 795; *Gibson v. May* (1853) 4 De G. M. & G. 512; 102 R. R. 408; *Cunliffe v. Blackburn Building Society* (1884) 9 App. Cas. 857.
 (d) *Ex parte Beall* (1883) 24 Ch. Div. 408; *Cunliffe v. Blackburn Building Society* (1884) 9 App. Cas. 857.

persons available against the principal at that time (e). It seems unnecessary to give illustrations of this rule or to multiply authorities, which are numerous, because an agent's lien being founded on a contract, express or implied, with the principal, it obviously follows that the law must be as stated. In the case of moneys or negotiable securities, an agent's lien is not affected by the rights or equities of third persons (f), provided he receives them honestly, and has no notice of any defect in the title of the principal at the time when the lien attaches (g). This does not depend on any principle of agency, but on the rule that any person who takes a negotiable instrument in good faith and for value acquires a good title notwithstanding any defect in the title of the person from whom he takes it; a person taking such an instrument under circumstances giving him a lien thereon being considered a holder for value to the extent of the lien (h).

Lien of sub-agents.—A sub-agent who is employed by an agent without the authority, express or implied, of the principal (i) has no lien, either general or particular, as against the principal (j). But a sub-agent who is properly appointed has the same right of lien against the principal in respect of debts and claims arising in the course of the sub-agency, on property coming into his possession in the course of the sub-agency, as he would have had against the agent employing him if the agent had been the owner of the property; and this right is not liable to be defeated by a settlement between the principal and agent to which the sub-agent is not a party (k). If a sub-agent properly appointed has no know-

(e) *London and County Bank v. Riddiffe* (1881) 6 App. Cas. 722; *Turner v. Letts* (1855) 20 Beav. 185; *Hollis v. Claridge* (1813) 4 Taunt. 807; 39 R. R. 662, 663; *Pratt v. Vizari* (1833) 5 B. & Ad. 808; 39 R. R. 660; *In re Llewellyn* [1891] 3 Ch. 145.

(f) *Jones v. Peppercorne* (1858) Johns. 430; 123 R. R. 177.

(g) *Solomons v. Bank of England* (1810) 13 East, 135; 12 R. R. 341; *De la Chaumette v. Bank of England* (1829) 9 B. & C. 208; 32 R. R. 643; *Ex parte Kingston* (1871) L. R. 6 Ch. 632.

(h) *London and Joint Stock Bank v.*

Simmons [1892] A. C. 201; *Misa v. Currie* (1876) 1 App. Cas. 554.

(i) See s. 190, above, p. 676.

(j) *Solly v. Rathbone* (1814) 2 M. & S. 298.

(k) *Fisher v. Smith* (1878) 4 App. Cas. 1 (policy broker's lien for premiums effective against principal of agent employing him though he knew him to be an agent, and though the principal had paid the agent the amount due for premiums); *Cahill v. Dawson* (1857) 3 C. B. N. S. 106; 111 R. R. 565; *Mildred v. Maspons* (1883) 8 App. Cas. 874.

- §. 221. lodge that the person employing him is an agent, but believes on reasonable grounds, at the time when the lien attaches, that the agent is the owner of the property and is acting on his own behalf, the sub-agent's lien, whether general or particular, is available against the principal to the same extent as it would have been against the agent if the agent had been the owner of the property; and the lien is not in such a case limited to debts and claims arising in the course of the sub-agency (*l*). If, however, the sub-agent is aware of the existence of a principal at the time when the lien attaches, his general lien in respect of debts and claims not arising in the course of the sub-agency is available against the principal only to the extent of the lien, if any, to which the agent employing him would have been entitled had the property been in his possession (*m*).

How lien lost or extinguished.—The lien of an agent, being a mere right to retain possession of the property subject thereto, is, as a general rule, lost by his parting with the possession (*n*); and where goods, on which an agent had a lien, were delivered by him on board a ship, to be conveyed on account and at the risk of the principal, it was held that the agent had no power to revive the lien by stopping the goods in transit (*o*). But where possession is obtained from the agent by fraud (*p*), or is obtained unlawfully and without his consent (*q*), his lien is not affected by the loss of possession. And if possession is given to a bailee for safe custody, or for some other purpose consistent with the continuance of the lien, and the circumstances are

(*l*) *Mann v. Forrester* (1814) 4 Camp. 60; 15 R. R. 724; *Westwood v. Bell* (1815) 4 Camp. 349; 16 R. R. 800; *Montagu v. Forwood* [1803] 2 Q. B. 350; all cases of policy brokers, in which it was held that the broker had a lien against the principal for a general balance due from the agent. *Taylor v. Kymer* (1832) 3 B. & Ad. 320; 37 R. R. 433, where a broker, employed by a commission agent to buy goods, was held to have a lien on the goods, for a general balance due to him from the commission agent.

(*m*) *Mildred v. Maspons* (1883) 8 App. Cas. 874; *Lery v. Barnard* (1818)

2 Moo 34; 19 R. R. 484; *Snook v. Davidson* (1809) 2 Camp. 218; 11 R. R. 696; *Ex parte Edwards* (1881) 8 Q. B. Div. 252.

(*n*) *Kruger v. Wilcox* (1754) Amb. 252; *Blight v. Davies* (1860) 28 Beav. 211.

(*o*) *Sweet v. Pym* (1800) 1 East, 4; 5 R. R. 497; *Hathesing v. Laing* (1873) L. R. 17 Eq. 92.

(*p*) *Wallace v. Woodgate* (1824) R. & M. 193.

(*q*) *Dicas v. Stockley* (1836) 7 C. & P. 587; 48 R. R. 825; *In re Carter* (1886) 55 L. J. Ch. 230.

such as to show that the agent intends to retain his rights, the lien will not be prejudiced by his parting with the possession (*r*). The lien of an agent is not affected by an order winding up the company whose agent he is. Therefore where the agent is in possession of property belonging to the company by virtue of his lien he cannot be required to deliver up possession to the official liquidator (*s*).

An agent's lien is extinguished by his entering into any agreement (*t*), or acting in any character (*u*), inconsistent with its continuance; and may be waived by conduct indicating an intention to abandon it (*v*). Whether the taking of other security for the claim secured by the lien operates as a waiver depends upon whether, having regard to the nature of the security, the position of the parties and all the other circumstances of the particular case, an intention to abandon the lien may be inferred (*w*).

The lien of an agent is not affected by the circumstance that the remedy for recovery of the debt or claim secured thereby becomes barred by the Statutes of Limitation (*x*), or that the principal becomes bankrupt or insolvent (*y*), nor by any dealing by the principal with the property subject to the lien (*z*), after the lien has attached.

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- (*r*) *North-Western Bank v. Poynter* 730; *In re Douglas* [1898] 1 Ch. 199 [1895] A. C. 55; *Watson v. Lyon* (1855) 7 De G. M. & G. 288.
- (*s*) *Chidambaram Chettiar v. Tinnelly Sugar Mills Co., Ltd.* (1908) 31 Mad. 123.
- (*t*) *Forth v. Simpson* (1849) 13 Q. B. 680; 78 R. R. 493; *How v. Kirchner* (1856) 11 Moo. P. C. 21; 117 R. R. 10; *The Rainbow* (1885) 5 Asp. M. C. 479.
- (*u*) *In re Nicholson* (1883) 53 L. J. Ch. 302; *In re Mason* (1878) 10 Ch. D. 729 (solicitor acting for mortgagor and mortgagee loses his lien on title deeds for costs due from mortgagor); *In re Lawrence* [1894] 1 Ch. 556.
- (*v*) *Jacobs v. Latour* (1828) 5 Bing. 130; *Weeks v. Goode* (1859) 6 C. B. N. S. 367.
- (*w*) *In re Taylor* [1891] 1 Ch. 590; *Groom v. Cheesewright* [1895] 1 Ch. 730; *In re Douglas* [1898] 1 Ch. 199 (a solicitor, taking a security for costs, must be deemed to waive his lien, unless he expressly reserves it, because it is his duty, if he intends to retain the lien, to inform the client that such is his intention); *Cowell v. Simpson* (1809) 16 Ves. 275; 10 R. R. 181; *Angus v. MacLachlan* (1881) 23 Ch. D. 330; *Tamvaco v. Simpson* (1866) L. R. 1 C. P. 363.
- (*x*) *Spears v. Hartley* (1798) 3 Esp. 81; 6 R. R. 814; *Curwen v. Milburn* (1889) 42 Ch. Div. 424.
- (*y*) *Robson v. Kemp* (1892) 4 Esp. 233; 8 R. R. 831; *The Cella* (1888) 13 P. Div. 82; *Ex parte Beall* (1893) 24 Ch. Div. 408.
- (*z*) *West of England Bank v. Hatchelor* (1882) 51 L. J. Ch. 199; *Godin v. London Assurance Co.* (1758) 1 W. Bl. 103.

s. 222.

Principal's duty to Agent.

222.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him.

Agent to be indemnified against consequences of lawful acts.

Illustrations.

(a) B., at Singapore, under instructions from A., of Calcutta, contracts with C. to deliver certain goods to him. A. does not send the goods to B., and C. sues B. for breach of contract. B. informs A. of the suit, and A. authorises him to defend the suit. B. defends the suit, and is compelled to pay damages and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

(b) B., a Broker at Calcutta, by the orders of A., a merchant there, contracts with C. for the purchase of 10 casks of oil for A. Afterwards A. refuses to receive the oil, and C. sues B. B. informs A., who repudiates the contract altogether. B. defends, but unsuccessfully, and has to pay damages, and costs, and incurs expenses. A. is liable to B. for such damages, costs, and expenses.

["For *there*, i.e., Calcutta," in illustration (b), "we should probably read Singapore": Whitley Stokes's note, referring to s. 230. Or it must be assumed that in some other way B. has made himself personally liable on the contract.]

Limits of Agent's Indemnity.—"If an agent has, *without his own default*, incurred losses or damages in the course of transacting the business of his agency or in following the instructions of his principal, he will be entitled to full compensation therefor. . . . But it is not every loss or damage for which the agent will be entitled to reimbursement from his principal. The latter is liable only for such losses and damages as are direct and immediate, and naturally flow from the execution of the agency" (a).

"The case of *Duncan v. Hill* (b) is a direct authority that there is no implied promise by a buying principal to his broker that he will indemnify him from the consequences of his own wrong (c), such as

(a) S. A. § 339, cited *arguendo* in *Duncan v. Hill*, L. R. 8 Ex. at p. 244.

(b) (1873) L. R. 8 Ex. 242.

(c) *Ellis v. Pond* [1898] 1 Q. B. 426, 441. As to death or insolvency of the principal justifying an immediate sale

by a broker who has bought on the principal's account with his own money, see *Lacey v. Hill* (1873) L. R. 8 Ch. 921; as to the broker taking over shares that are practically unmarketable, *Re Finlay* [1913] 1 Ch. 565, C. A.

insolvency (d) [or negligence] (e) or having sold at a loss in breach of his agreement with the principal" (f). S. 222

The right of indemnity extends to losses or liabilities incurred in the exercise of the authority according to the rules and customs of the particular trade or market in which the agent is authorised to deal, provided the rule or custom in question is a reasonable one (g), or the principal had notice of it at the time when he conferred the authority (h); but if the rule or custom is unlawful or unreasonable, and was unknown to the principal, he is under no liability to indemnify the agent against the consequences of acting on it (i).

Ratification by the principal will cure the agent's default and restore his ordinary right to indemnity (j).

Costs of defending action.—Illustration (b) corresponds with an English decision, but omits the fact, there treated as material, that the agent was found by the verdict of the jury to have done what a prudent and reasonable man would have done in his own case (k). Perhaps it may be thought that this condition is sufficiently implied in the text. A similar condition is expressed in s. 195 (p. 681, above).

"Lawful."—A wagering contract is void, not unlawful (see s. 30). When a suit therefore is brought by a betting agent against

(d) (1873) L.R. 8 Ex. 242.

(e) *Lewis v. Samuel* (1846) 8 Q. B. 685; 70 R. R. 582.

(f) *Ellis v. Pond*, note (c), above.

(g) *Davis v. Howard* (1890) 24 Q. B. D. 691; *Young v. Cole* (1837) 3 Bing. N. C. 724, 43 R. R. 783; *Biederman v. Stone* (1867) L. R. 2 C. P. 504. These were all cases of rules and usages of the Stock Exchange, but the principle is of general application. *Ex parte Bishop* (1886) 15 Ch. Div. 400 (guarantee given by bill broker according to usage).

(h) *Seymour v. Bridge* (1885) 14 Q. B. D. 460.

(i) *Perry v. Barnett* (1885) 15 Q. B. Div. 388 (custom to disregard the pro-

visions of an Act of Parliament).

Westropp v. Solomon (1849) 8 C. B. 345; 79 R. R. 530, seems anomalous

as compared with the authorities for the general rule, and not easy to bring within any recognised exception, if indeed it is consistent with *Sheffield Corporation v. Farlay* [1907] A. C. 392. We do not think it a practical authority in England at this day, or of any value in India.

(j) *Hartas v. Ribbons* (1889) 22 Q. B. Div. 254.

(k) *Broom v. Hall* (1659) 7 C. B. N. S. 503; 121 E. R. 614. And see *Frizzone v. Tagliaferro* (1855) 10 Moo. P. C. 175; 110 R. R. 21.

his principal to recover a loss on betting paid by the agent, the principal cannot escape liability on the ground that the agent's act was unlawful (l). See notes to s. 30 under the head "Agreements collateral to wagering contracts," p. 229, above.

C. I. F. contract with commission agent.—Though under an ordinary c. i. f. contract between sellers and buyers, the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the buyers are bound to accept, such a tender is a good tender when goods are ordered through a commission agent "on account and at the risk of" the principal, and the principal is bound to accept the tender and pay for the goods. "To throw these goods on the agent's hands and leave them to bear the loss which has arisen by reason of the outbreak of war while the goods were in transit appears to be entirely opposed to, and inconsistent with, the general principles of the law of agency" (m).

223.—Where one person employs another to do an act and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.

Agent to be indemnified against consequences of acts done in good faith.

Illustrations.

(a) A., a decree-holder, and entitled to execution of B.'s goods, requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C., the true owner of the goods. A. is liable to indemnify the officers for the sum which he is compelled to pay to C., in consequence of obeying A.'s directions.

(b) B., at the request of A., sells goods in the possession of A., but which A. had no right to dispose of. B. does not know this, and hands over the proceeds of the sale to A. Afterwards C., the true owner of the goods, sues B., and recovers the value of the goods and costs. A. is liable to indemnify B. for what he has been compelled to pay to C., and for B.'s own expenses.

(l) *Behari Lal v. Parbhu Lal* (1908) P. 79; *Shibho Mal v. Lachman Das* (1901) 23 All. 165; *Chehka v. Gajjala* (1904) 14 Mad. L. J. 326. (m) *Harry Meredith v. Abdulla Sahib* (1918) 41 Mad. 1080.

Illustration (a) seems to have been suggested by the observations of the Court of Exchequer Chamber on similar facts. A judgment creditor who requires an officer of the law to take specified goods pointing them out as the goods of the debtor, makes that officer his agent, and must indemnify him if, acting in good faith, he commits a trespass in obeying the instructions (n).

86.
223, 224.

Unlawful Acts.—The preceding section deals with indemnity against the consequences of lawful acts; this section with the consequences of unlawful acts done in good faith. It is clearly settled that an agent cannot claim indemnity in respect of acts which he knows to be unlawful, even if they are not criminal, whether on a express or implied promise (o). Any such promise is void as being contrary to public policy.

224.—Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

Non-liability of
employer of agent
to do a criminal
act.

Illustrations.

(a) A. employs B. to beat C., and agrees to indemnify him against all consequences of the act. B. thereupon beats C., and has to pay damages to C. for so doing. A. is not liable to indemnify B. for those damages.

(b) B., the proprietor of a newspaper, publishes, at A.'s request, a libel upon C. in the paper, and A. agrees to indemnify B. against the consequences of the publication, and all costs and damages of any action in respect thereof. B. is sued by C., and has to pay damages, and also incurs expenses. A. is not liable to B. upon the indemnity.

The rule in the text is elementary, Illustration (b) seems to assume that every libel for which damages can be recovered is also a crime, or, in other words, that defamation as defined in the Indian

(n) *Collins v. Evans* (1844) 5 Q. B. 820, 829, 830; 64 R. R. 656, 663.

(o) Illegal insurance: *Allkins v. Jupe* (1877) 2 C. P. D. 375. Illegal payment: *In re Parker* (1882) 21 Ch. Div.

408. Purchase of smuggled goods: *Ex parte Mather* (1797) 3 Ves. 373; *Betts v. Gibbins* (1834) 2 A. & E. 57; 41 R. R. 381.

ss.
334, 225.

Penal Code includes all the cases in which a civil action for injurious words is maintainable in British India. We are not aware of any authority for such an assumption. An indemnity against damages for libel is now a common clause in agreements with publishers in England, and we have not heard of any one suggesting that such a term is invalid as being against public policy. Probably the true construction of the section is that it only applies where the act is criminal on the part of the agent, which in most cases would amount to the same thing as saying that it must be criminal to his knowledge. The rule could hardly be held to apply to a crime committed by means of an innocent agent.

Compensation to
agent for injury
caused by prin-
cipal's neglect.

225.—The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

Illustration.

A. employs B. as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B. is in consequence hurt. A. must make compensation to B.

This, as a general rule, needs no proof or illustration. But the agent may be disentitled to relief if the injury was due to his own contributory negligence. This subject belongs to the law of civil wrongs; the English law must be sought in works on the law of torts or in monographs on negligence, of which the late Mr. Thomas Beven's is the most learned and complete. It cannot be usefully discussed or stated here. The same remark applies to the defence of "common employment," which, however, is not applicable to cases where the negligence is the employer's own. There is nothing in British Indian legislation resembling the Employer's Liability Act or the Workmen's Compensation Act. Sections on these matters were in the original draft of the Indian Law Commissioners, but were omitted at a later stage, presumably as not being appropriate in a Contract Act.

An agent is not, generally speaking, entitled to sue the principal on any contract made on his behalf, even if the agent is personally liable on the contract to the third party. If a merchant resident

abroad employs an agent to buy goods, and the agent buys them and gives his own acceptance for the price, he cannot sue the principal as for goods sold, because the contract between them is not one of buying and selling, but of agency (p). Similarly, if a broker buys goods on behalf of an undisclosed principal, he cannot sue the principal for non-acceptance of the goods (q), or for goods bargained and sold (r). His only remedy is an action for indemnity under s. 222 (p. 726, above). There is an exception to this rule in the case of policy brokers, who, by custom, are entitled to sue their principals for premiums due under policies effected on their behalf, though the brokers may not have paid the premiums nor settled with the underwriters in respect thereof (s).

See
225, 226.

Effect of agency on contracts with third persons.

226.—Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner, and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person.

Enforcement and consequences of agent's contracts.

Illustrations.

(a) A. buys goods from B., knowing that he is an agent for their sale, but not knowing who is the principal. B.'s principal is the person entitled to claim from A. the price of the goods, and A. cannot, in a suit by the principal, set off against that claim a debt due to himself from B.

(b) A. being B.'s agent, with authority to receive money on his behalf, receives from C. a sum of money due to B. C. is discharged of his obligation to pay the sum in question to B.

This section assumes that the contract or act of the agent is one which, as between the principal and third persons, is binding on the principal. If the contract is entered into or act done professedly

(p) *Seymour v. Pychlau* (1817) 1 B. & Ald. 14.

(q) *Telley v. Shand* (1872) 25 L. T. 58.

(r) *White v. Benckendorff* (1873) 29 L. T. 475.

(s) *Power v. Butcher* (1829) 5 M. & R. 327; 34 R. R. 432.

ss.
226, 227.

on behalf of the principal, and is within the scope of the actual authority of the agent, there is no difficulty. It is immaterial in such a case what may be the motive of the agent. The principal is bound though the contract may be entered into or act done fraudulently in furtherance of the agent's own interests, and contrary to the interests of the principal, provided the person dealing with the agent acts in good faith (*l*). This does not depend on the principle of estoppel, and it is immaterial whether the third person has any knowledge of the existence or extent of the agent's actual authority or not (*u*). With regard to contracts and acts which are not actually authorised, the principal may be bound by them, on the principle of estoppel, if they are within the scope of the agent's ostensible authority; but in no case is he bound by any unauthorised act or transaction with respect to persons having notice that the actual authority is being exceeded. This subject is dealt with by s. 237 (p. 766 below) and the commentary thereon (*v*).

The expression "contract" includes a promissory note. A. authorizes B. to execute a promissory note on his behalf in favour of C. B. executes the note by putting a mark described in the note as "*nishani* (mark) of A.". A. is bound by the note (*w*).

This section does not touch the conditions under which the agent can sue or be sued on the contract in his own name, as to which see ss. 230—234, pp. 738—756 below. The principal must be able to show that the third party dealt with the agent as such (*x*).

227.—When an agent does more than he is authorised

Principal how far
bound when agent
exceeds authority.

to do, and when the part of what he does, which is within his authority, can be separated from the part which is beyond his

(*l*) *Hambro v. Burnand* (1904) 2 a verbal authority.

K. B. 10, where authority was given to underwrite policies of insurance in the name of the principal according to the ordinary course of business at Lloyd's, and the agent, in fraud of the principal, underwrote certain guarantee policies. In this case the authority was in writing, but there does not appear to be any distinction in the application of the principle between a written and

(*u*) See last note.

(*v*) See also ss. 108 and 178 as to sales and pledges by persons having possession of goods or documents of title thereto.

(*w*) *Challa Balayya v. Kanuparihi* (1917) 40 Mad. 1171.

(*x*) *Sims v. Bond* (1833) 5 B. & Ad. 389; 39 R. R. 511.

authority, so much only of what he does as is within his authority is binding as between him and his principal. Ss.
227, 228.

Illustration.

A., being owner of a ship and cargo, authorises B. to procure an insurance for 4,000 rupees on the ship. B. procures a policy for 4,000 rupees on the ship, and another for the like sum on the cargo. A. is bound to pay the premium for the policy on the ship, but not the premium for the policy on the cargo.

"The principal is not bound by the unauthorised acts of his agent, but is bound where the authority is pursued, or so far as it is distinctly pursued": S. A. § 170. This and the following section must be read subject to s. 237 (below, p. 760).

228.—Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound to recognise the transaction.

Principal not bound when excess of agent's authority is not separable.

Illustration.

A. authorises B. to buy 500 sheep for him. B. buys 500 sheep and 200 lambs for one sum of 6,000 rupees. A. may repudiate the whole transaction.

The law declared in this and the preceding section is concisely illustrated by an English case where B., an insurance broker at Liverpool, was authorised by A. to underwrite policies of marine insurance in his name and on his behalf, the risk not to exceed £100 by any one vessel. B. underwrote a policy for Z., without A.'s authority or knowledge, for £150. Z. did not know what the limits of B.'s authority were, but it was well known in Liverpool that a broker's authority was almost invariably limited, though the limit of the authorised amount in each case was not disclosed. The Court held that A. was not liable for the insurance of £150 which he had not authorised, and the contract could not be divided so as to make him liable for £100 (y). The only argument to the contrary was that in the circumstances

(y) *Baines v. Ewing* (1866) L. R. 1 Ex. 320. The law is the same if the agent is authorised to raise not less than a certain sum on the security of documents of title and does raise less: *Fry v. Smellie* [1912] 3 K. B. 282 C. A.

8s. B. must be regarded as a general agent whose powers could not be
228, 229. limited by any private instructions.

Further illustrations are supplied by Indian cases. A. authorises B. to draw bills to the extent of Rs. 200 each. B. draws bills in the name of A. for Rs. 1,000 each. A. may repudiate the whole transaction (z).

A. instructs B. to enter into a contract for the delivery of cotton at the end of January. B. enters into a contract for delivery by the middle of that month. A. is not bound by the contract, and any custom of the market allowing B. to deviate from A.'s instructions will not be enforced by the Court (a).

229.—Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

Consequences of
notice given to
agent.

Illustrations.

(a) A. is employed by B. to buy from C. certain goods, of which C. is the apparent owner, and buys them accordingly. In the course of the treaty for the sale, A. learns that the goods really belonged to D., but B. is ignorant of that fact. B. is not entitled to set off a debt owing to him from C. against the price of the goods.

(b) A. is employed by B. to buy from C. goods of which C. is the apparent owner. A. was, before he was so employed, a servant of C., and then learnt that the goods really belonged to D., but B. is ignorant of that fact. In spite of the knowledge of his agent, B. may set off against the price of the goods a debt owing to him from C.

[In illustration (b) it must be understood, as the fact was in the corresponding English case mentioned below, that C. is D.'s factor selling in his own name, and there is no question of fraud.]

The rule laid down in this section is intended to declare a general principle of law, "It is not a mere question of constructive notice or

(z) *Premabhai v. Brown* (1873) 10 B. H. C. 319. (a) *Arlapa Nayak v. Narsi Keshavji* (1871) 8 B. H. C. A. C. 19.

inference of fact, but a rule of law which imputes the knowledge of the agent to the principal, or in other words, the agency extends to receiving notice on behalf of his principal of whatever is material to be stated in the course of the proceedings " (b).

But by the terms of the present section, which are cited in the same judgment, the application of the principle is limited by the condition that the agent's knowledge must have been obtained "in the course of the business transacted by him for the principal" (c). This is further enforced by illustration (b), which appears to be taken from a decision of the Court of Common Pleas in 1863. Here the general rule was laid down as being "that whatever an agent does within the scope of his employment, and whatever information comes to him in the course of his employment, as agent, binds his principal" (d). This limitation, however, was rejected by the Court of Exchequer Chamber, which unanimously reversed the decision of the Common Pleas, and held that the buyer was not entitled to set off a debt due to him from the factor. "We think," the Court (e) said, "that in a commercial transaction of this description, where the agent of the buyer purchases on behalf of his principal goods of the factor of the seller the agent having present to his mind at the time of the purchase a knowledge that the goods he is buying are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is the knowledge of the principal."

Thus the law of British India on this point follows the reversed decision of the Court of Common Pleas. It may have been a deliberate preference, or it may be permissible to conjecture that the section was originally drafted in 1864 or 1865, before the report of

(b) Judgment of Judicial Committee in *Rampal Singh v. Balbhaddar Singh* (1902) 25 All. 1, 17; L. R. 29 Ind. Ap. 203.

(c) See *Chhibhai Lalloobhai v. Dayal Mowji* (1907) 31 Bom. 566, 581; L. R. 34 Ind. Ap. 179, 184.

(d) *Dresler v. Norwood* (1863) 14 C. B. N. S. 574, 587, per Erle, C.J., Willes, J., and Keating J., delivered

judgments to the same effect.

(e) Pollock, C.B., Crompton, J., Bramwell, B., Channell, B., Blackburn, J., and Shee, J.: S. C. in Ex. Ch. 1864, 17 C. B. N. S. 466, 481. This is contrary to Story's opinion (S. A. § 140), but is accepted by his later editors and in American decisions to which they refer.

- §. 229. the case in the Exchequer Chamber was published, and that report was afterwards overlooked. Probably the difference is seldom of practical importance, but it seems inconvenient that such a difference should exist between English and Indian law without very strong reasons.

The following are illustrations from the English authorities of the rule stated in the section. An agent of an insurance company having negotiated a contract with a man who had lost the sight of an eye, it was held that the agent's knowledge of the fact must be imputed to the company, and that it could not avoid the contract on the ground of non-disclosure thereof by the assured (*f*). A ship sustained damage in the course of a voyage, and the master subsequently wrote a letter to the owner, but did not mention the fact of the damage. It was held that the master ought to have communicated the fact, and, the owner having insured the ship after receipt of the letter, that the insurance was void on the ground of non-disclosure (*g*). When the knowledge of an agent is imputed to the principal, the principal is considered to have notice as from the time when he would have received notice if the agent had performed his duty and communicated with him with reasonable diligence (*h*).

The knowledge of an agent is not imputed to the principal unless it is of something that it is his duty as agent to communicate to the principal. It is not the duty of a policy broker, employed to effect an insurance, to communicate to his principal material facts coming to his knowledge in relation to the subject-matter of the proposed insurance, but only to make disclosure of all such facts to the insurers; and, accordingly, where a broker failed to effect a desired insurance, and another broker was employed, who succeeded, it was held that the policy could not be avoided on the ground of the non-disclosure of a material fact which had come to the knowledge of the first-mentioned broker, but of which neither the principal nor the broker

(*f*) *Pawden v. London, etc., Assurance Co.* [1892] 2 Q. B. 534. 1 R. R. 134.

(*h*) *Proudfoot v. Montefiori* (1867)

(*g*) *Gladstone v. King* (1813) 1 M. & S. 35; 14 R. R. 392. And see *Fitzherbert v. Mather* (1785) 1 T. R. 12;

L. R. 2 Q. B. 511, where it was held under the particular circumstances that the agent ought to have telegraphed.

who effected the policy was aware (i). Nor will notice given to or information acquired by an agent of circumstances which are not material to the business in respect of which he is employed be imputed to the principal (j).

An important exception to the rule that the knowledge of an agent is equivalent to that of the principal exists in cases where the agent has taken part in the commission of a fraud on the principal. In such cases notice is not imputed to the principal of the fraud or the circumstances connected therewith, because of the extreme improbability of a person communicating his own fraud to the person defrauded (k). On this ground it has been held in India that notice will not be presumed to have been given by an attorney to his client where such notice would involve a confession by the attorney of a fraud practised by himself (l). But the exception does not apply where the fraud is committed, not against the principal, but against a third person (m). And the mere fact that an agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal, if it is his duty to communicate them (n). Where, however, the person seeking to charge the principal with notice was aware that the agent intended to conceal his knowledge, such knowledge will not be imputed to the principal (o).

It is to be observed that notice through an agent is not the same thing as constructive notice and should not be confused with it. The

(i) *Blackburn v. Vigors* (1887) 12 App. Cas. 531. And see *In re Fenwick* [1902] 1 Ch. 507; *Société Générale de Paris v. Tramways Union Co.* (1884) 14 Q. B. Div. 424; *In re Payne* [1904] 2 Ch. 608.

(j) *Wilde v. Gibson* (1848) 1 H. L. Cas. 605; 71 R. R. 191; *Powles v. Page* (1846) 3 C. B. 16; 71 R. R. 262, where the directors of a banking company, who had no voice in the management of the accounts, acquired knowledge of circumstances relating thereto; *Tate v. Hyslop* (1885) 15 Q. B. D. 368, where a material fact in connection with an insurance had been

disclosed to the insurer's solicitor. It is not in the ordinary course of a solicitor's employment to receive notices in connection with mercantile transactions.

(k) *Cave v. Cave* (1880) 15 Ch. D. 639; *Waldy v. Gray* (1875) L. R. 20 Eq. 238; *In re Fitzroy Steel Co.* (1884) 50 L. T. 141.

(l) *Hormazji v. Mankuvarbai* (1875) 12 B. H. C. 262.

(m) *Boursot v. Savage* (1866) L. R. 2 Eq. 134; *Dixon v. Winch* [1900] 1 Ch. 736.

(n) *Rolland v. Hart* (1871) L. R. 6 Ch. 678; *Bradley v. Riches* (1878) 9 Ch. D. 189; *Dixon v. Winch*, last note.

(o) *Sharpe v. Foy* (1868) 17 W. R. 65.

88. agent's knowledge is imputed to the principal without regard to any
 29, 230. question of what the principal in person knew or might have known. Such is not the nature of constructive notice. A man is said to have constructive notice of that which he is treated as having known because, though not proved to have actually known it, he might and ought to have known it with reasonably diligent use of the means of knowledge at his disposal. Now an agent's constructive as well as his actual notice may be imputed to the principal in any transaction where constructive notice has to be considered at all (p). On the whole, then, a man have notice either by himself or by his agent, and that notice may be either actual or (in an appropriate case) constructive.

Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.

230.—In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is personally bound by them.

Such a contract shall be presumed to be on the following cases:—

Presumption of contract to contrary.

(1) where the contract is by an agent for the sale of goods for a merchant resident abroad ;

(2) where the agent does not disclose the name of his principal;

(3) where the principal, though disclosed, cannot be sued.

Principle of the Rule and Exceptions.—The test question in cases within the principle of this section is always to whom credit is given by the other party, or, if that cannot be proved as a fact, to whom it may reasonably be presumed to have been given. Thus, in the cases here specially mentioned, the party cannot be supposed

(p) That the equitable refinements of L.J., in *Manchester Trust v. Furness* [1895] 2 Q. B. 539, 545. constructive notice do not apply to commercial transactions, see per Lindley,

to rely exclusively on a foreign principal whom, by general mercantile usage, the agent's contract is not understood to bind, or on a person whose name he does not know, and whose standing and credit he therefore cannot verify, or on a person or body who, for whatever reason, is on the face of the transaction not legally liable. For the general rule it is needless to multiply authorities. "Ordinarily an agent contracting in the name of his principal and not in his own name is not entitled to sue, nor can he be sued, on such contracts." "When in making a contract no credit is given to himself as agent, but credit is exclusively given to his principal, he is not personally liable thereon"; S. A. §§ 261, 263, 271, 391. The rule applies although the agent knows that the contract is one that he has no authority to make on behalf of the principal, and makes it fraudulently. Even in that case he cannot be sued on the contract if it is professedly made by him merely in his capacity as agent (q).

Contract to the contrary.--Whether an agent, apart from the cases specially mentioned, is to be taken to have contracted personally, or merely on behalf of the principal, depends on what appears to have been the intention of the parties, to be deduced from the nature and terms of the particular contract and the surrounding circumstances (r). In the case of oral contracts the question is purely one of fact (s). If the contract is in writing, the presumed intention is that which appears from the terms of the written agreement as a whole (t). Where, in an agreement to grant a lease, the agent was described as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease, it was held that he had contracted personally although the premises belonged to the principal (u). A contract in the following form: "We the undersigned, three of the directors, agree to repay 500*l*."

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- (q) *Lewis v. Nicholson* (1852) 13 Q. B. 503; 88 R. R. 683; *Jenkins v. Hutchinson* (1849) 13 Q. B. 744; 78 R. R. 500. But he may be sued for compensation under s. 235, or in an action of deceit.
- (r) S. Bowstead on Agency, 6th ed., pp. 388 *seq*.
- (s) *Lakeman v. Mountstephen* (1874) L. R. 7 H. L. 17; *Jones v. Littledale* (1837) 1 N. & P. 677; 45 R. R. 542; *Long v. Millar* (1879) 4 C. P. Div. 650; *Williamson v. Earton* (1862) 7 H. & N. 899.
- (t) *Spittle v. Lavender* (1821) 5 Moo. 70; 23 R. R. 508.
- (u) *Norton v. Herron* (1823) 1 C. & P. 648; 28 R. R. 797. And see *Tanner v. Christian* (1855) 4 E. & B 591; 90 R. R. 637.

S. 230. advanced . . . to the company," was held to be a personal contract on the part of the directors (*v*). On the other hand, a contract in the terms "I undertake on behalf of A. (the principal) to pay, &c.," signed by the agent, was held not to involve personal liability (*w*). A broker selling expressly on account of a known principal will not be liable to him for the price, although the buyer is undisclosed and described in the sold note as "my principal" (*x*).

An agent who signs a contract in his own name without qualification, though known to be an agent, is understood to contract personally, unless a contrary intention plainly appears from the body of the instrument (*y*), and the mere description of him as an agent, whether as part of the signature or in the body of the contract, is not sufficient indication of a contrary intention to discharge him from the liability incurred by reason of the unqualified signature (*z*). On the other hand, if words are added to the signature, indicating that he signs "as an agent," or on behalf of the principal, he is considered not to contract personally, unless it plainly appears from the body of the contract, notwithstanding the qualified signature, that he intended to make himself a party (*a*). The authorities in support and illustration of these rules of construction are very numerous (*b*), but the rules themselves are so well established and recognised that it has been deemed sufficient to mention only a few of the cases. Where an agent signed a charter-party in his own name without qualification he was held personally liable, although he was described as an agent for named principals (*c*). A similar decision was given in a case where the agent was described in the body of the contract as "consignee and agent on behalf of" his principal, naming him (*d*).

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- (*v*) *McCollin v. Gilpin* (1881) 6 361. .
 Q. B. D. 516. (*z*) *Hough v. Manzanos* (1879) 4 Ex.
 (*w*) *Dowman v. Williams* (1845) 7 D. 104; *Hutchinson v. Eaton* (1884) 13
 Q. B. 103; 63 R. R. 413. *Cp. Iveson* Q. B. Div. 861.
v. Conington (1823) 1 B. & C. 160: (*a*) *Deslandes v. Gregory* (1860) 30
 25 R. R. 344. L. J. Q. B. 36; *Redpath v. Wigg* (1866)
 (*x*) *Southwell v. Bowditch* (1876) 1 L. R. 1 Ex. 335.
 C. P. Div. 574. (*b*) See *Bowstead on Agency*, 6th ed.,
 pp. 396—400. .
 (*y*) *Higgins v. Senior* (1841) 8 M. & W. 834; 58 R. R. 884; *Fairlie v.*
Fenton (1870) L. R. 5 Ex. 169; *Calder* & B. 912.
v. Dobell (1871) L. R. 6 C. P. 486; (*d*) *Kennedy v. Gourcia* (1823) 3 D.
Dutton v. Marsh (1871) L. R. 6 C. B. & R. 503; 26 R. R. 616.

On the other hand, the words "on account of" (e) "on behalf of" (f) a named principal in the body of the contract have been held sufficient to exclude personal liability, notwithstanding an unqualified signature. *Lennard v. Robinson* (g) is an instance of a case where an agent was held personally liable because he appeared as a contracting party in the body of the contract, although he signed it "by authority of and as agent of" a named principal. S. 230.

Oral evidence of intention is not admissible for the purpose of discharging an agent from liability on a written contract, from the terms of which he appears to have intended to contract personally (h); although it has been held in England that he is entitled, by way of equitable defence, to prove an express oral agreement that, having regard to his being merely an agent, he should not be sued on such a contract (i). But where the terms of the written contract are such as not to import a personal liability on the part of the agent, oral evidence may be given to show that by the custom of the particular trade an agent so contracting is personally liable, either absolutely or conditionally (j), provided the custom is not inconsistent with the express written terms (k).

Thus where a firm of brokers entered into a contract "for principals" for the sale of gunny and hessian, oral evidence was allowed to show that by custom of the trade in gunny and hessian in Calcutta brokers were personally liable both to buyers and (l) sellers.

(e) *Gadd v. Houghton* (1876) 1 Ex. 768.

Div. 357, C. A., disapproving *Puice v. Walker* (1870) L. R. 5 Ex. 173, where the words were "as agent for" a named principal.

(f) *Ugden v. Hall* (1879) 40 L. T. 751.

(g) (1855) 5 E. & B. 125. See also *Weidner v. Hoggell* (1876) 1 C. P. D. 533; *Young v. Schuler* (1883) 11 Q. B. D. 651.

(h) *Higgins v. Senior* (1841) 8 M. & W. 834; 58 R. R. 884; *Holding v. Elliott* (1860) 5 H. & N. 117; 120 R. R. 504.

(i) *Wake v. Harrop* (1862) 1 H. & C. 202; 130 R. R. 461, affg. 6 H. & N.

(j) See *Pike v. Ungley* (1887) 18 Q. B. D. 708, citing and summarising former decisions. Such a custom may make the agent liable as well as the principal, but would be bad if it purported to make him exclusively liable. The existence of any such custom is of course a question of fact.

(k) *Barrow v. Lyster* (1884) 13 Q. B. D. 635, where a clause providing that the agents (brokers) should act as arbitrators in the event of dispute was held inconsistent with a custom making them personally liable.

(l) *Joy Lall & Co. v. Monmotha Nath* (1916) 20 Cal. W. N. 365.

S. 230. Agency coupled with interest.—It is also settled law that when an agent “has made a contract in the subject-matter of which he has a special property he may, even though he contracted for an avowed principal, sue in his own name” (m). Such is the case of a factor (n), and of an auctioneer, who “has a possession coupled with an interest in goods which he is employed to sell, not a bare custody, like a servant or a shopman” and a special property by reason of his lien (o). Conversely the auctioneer may be liable to the buyer for neglect to deliver the goods (p) or to an outstanding true owner for conversion (q) and if the sale has been advertised as being without reserve, the auctioneer is deemed to impliedly contract to accept the offer of the highest *bonâ fide* bidder and is liable to him in damages if he accepts a bid from the vendor (r).

The like rule is laid down by Indian Courts: “Where an agent enters into a contract as such, if he has interest in the contract, he may sue in his own name” (s). This is not a real exception to the rule laid down at the beginning of the section, the agent being in such a case virtually a principal to the extent of his interest in the contract.

Whenever an agent has entered into a contract in such terms as to be personally liable, he has a corresponding right to sue thereon (t), and this right is not affected by his principal’s renunciation of the contract (u). Policy brokers also are entitled by custom to sue in their own names on all policies effected by them (v). But the mere

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| (m) 2 Sm. L. C. 415. | 24 Mad. 130. |
| (n) <i>Snee v. Prescott</i> (1743) 1 Atk. 248; <i>Fisher v. Marsh</i> (1865) 6 B. & S. 411. | (t) <i>Cooke v. Wilson</i> (1856) 1 C. B. N. S. 153; <i>Agacio v. Forbes</i> (1861) 14 Moo. P. C. 160; <i>Robertson v. Wail</i> (1853) 8 Ex. 299; 91 R. R. 497. |
| (o) <i>Williams v. Millington</i> (1788) 1 H. Bl. 81; 2 R. R. 724. | (u) <i>Short v. Spackman</i> (1831) 2 B. & Ad. 962 (broker, who had bought goods in his own name, held entitled to recover damages for non-delivery, though the principal, with the broker’s acquiescence, had renounced the contract). |
| (p) <i>Woolfe v. Horne</i> (1877) 2 Q. B. D. 355. | (v) <i>Provincial Insurance Co. v. Ledue</i> (1874) L. R. 6 P. C. 224; <i>Oom v. Bruce</i> (1810) 12 East, 225; 11 R. R. 367; <i>Kensington v. Inglis</i> (1807) 8 East, 273; 9 R. R. 438. |
| (q) <i>Consolidated Co. v. Curtis & Son</i> [1892] 1 Q. B. 495. The material part of the judgment in <i>Williams v. Millington</i> is quoted at p. 499. | |
| (r) <i>Warlow v. Harrison</i> (1858) 1 E. & E. 295, 309; 117 R. R. 219, 227; <i>Heatley v. Newton</i> (1881) 19 Ch. Div. 326. | |
| (s) <i>Subrahmanya v. Narayanan</i> (1900) | |

fact that an agent is acting under a *del credere* commission does not give him the right to personally enforce a contract which he is not otherwise entitled to enforce (*w*). S. 230.

Right of agent to sue for money paid by mistake, etc.—An agent may in his own name sue for the recovery of money paid on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of the fraud or other wrongful act of the payee, or otherwise under circumstances rendering the payee liable to repay the money (*x*).

Presumed exceptions: Foreign principal.—This is based on convenience and general mercantile usage. In the case of a British merchant buying for a foreigner, "according to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner" (*y*); for "a foreign constituent does not give the commission merchant any authority to pledge his credit to those" with whom the commissioner deals on his account (*z*). Here, unless a contrary agreement appears, the foreign principal is not a party to the contract at all, and can neither sue (*a*) nor be sued (*b*) on it. The question was originally one of fact (*z*), but at this day doubts in particular cases are reducible to a question whether, on the construction of the contract with regard to the facts, there does appear an intention that the principal shall be a party (*b*). On the question whether an agent is to be considered as having contracted personally the true intention has to be deduced as in other cases, from the terms of the contract and surrounding circumstances. The circumstances that the principal is a foreigner gives rise to a presumption, but only a presumption, of an intention to contract personally, and the presumption may be rebutted by indication of an intention to the contrary (*c*). Where

(*w*) *Bramwell v. Spiller* (1870) 21 L. T. 672.

(*y*) *Stevenson v. Mortimer* (1778) Cowp. 805; *Holt v. Ely* (1853) 1 E. & B. 795; 93 R.R. 398; *Colonial Bank v. Exchange Bank* (1885) 11 App. Cas. 81.

(*z*) *Thomson v. Davenport* (1829) 9 B. & C. at p. 87; 32 R. R. at p. 585.

(*a*) *Armstrong v. Stokes* (1872) L. R.

7 Q. B. 598, 565, *Cur., per Blackburn, J.*

(*b*) *Elbinger Actien-Gesellschaft v.*

Claye (1873) L. R. 8 Q. B. 473.

(*c*) *Hutton v. Bullock* (1874) L. R. 9 Q. B. 572.

(*c*) See the authorities critically reviewed in *Miller, Gibb & Co. v. Smith & Tyren* [1917] 2 K. B. 141, C. A., where some doubt was thrown on the

S. 230. an agent was described as contracting "on behalf of" a foreign principal, who was named, it was held that the agent was not personally liable though he signed the contract in his own name (*d*), and a similar decision was come to where the contract note described the agents as having sold "on account of" certain foreign principals (*e*), and where signature "as agents" was combined with description of the principal parties as "seller" and "buyer" (*f*).

A company having its registered office in England, but carrying on business in India, will be deemed to be resident in England for the purposes of this section. Where a contract, therefore, is entered into by the "managing agents" of such a company in India, it can be enforced against the agents personally, unless the foreign company is in writing made the contracting party, and the contract is made directly in its name (*g*).

Principal undisclosed.—The rule under this head is so well settled that it will suffice to refer to recent Indian cases without going back here to the ultimate authorities. The qualifications expressed in the following sections to s. 234 inclusive, are now the part of the doctrine requiring most attention. The decisions establishing them contain ample proof of the rule. The same principles are followed in Indian Courts. The honorary secretary, therefore, of a school alleged to have been maintained by an association in London is personally liable for the rent of a house hired by him in his name for the purposes of the school (*h*). But if the other party knows that the agent is contracting as such, the presumption laid down in this clause does not arise, although at the time of making the contract the agent does not disclose the name of the principal, the knowledge being in such a case equivalent to disclosure (*i*). Thus the secretary of a club cannot be sued personally for work done for the club, unless he has pledged his personal credit (*j*). And similarly he cannot sue a member

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| continuing validity of the usage under modern conditions: at all events it is excluded when the terms of the contract make the foreign principal liable. | <i>Co.</i> (1903) 27 <i>Mad.</i> 315. |
| (<i>d</i>) <i>Ogden v. Hall</i> (1879) 40 <i>L. T.</i> 751. | (<i>h</i>) <i>Ehojabhai v. Hayern Samuel</i> (1898) 22 <i>Bom.</i> 754. |
| (<i>e</i>) <i>Gadd v. Houghton</i> (1876) 1 <i>Ex. Div.</i> 357, <i>C. A.</i> | (<i>i</i>) <i>Mackinnon v. Lang</i> (1881) 5 <i>Bom.</i> 584. |
| (<i>f</i>) Note (<i>c</i>), page 743 above. | (<i>j</i>) <i>North-Western Provinces Club v. Sadullah</i> (1898) 20 <i>All.</i> 497; <i>Kanwar Rautor v. Hebbert</i> (1891) <i>Punj. Rec.</i> no. 15. |
| (<i>g</i>) <i>Tutika Basavaraju v. Parry &</i> | |

on behalf of the club for goods supplied to him (*k*). But the presumption that an agent is personally bound by a contract when the name of the principal is not disclosed may be rebutted, and where the contract is in writing, the whole of the contract is for that purpose to be examined (*l*). The mere fact, however, that the agent has signed himself as such will not rebut the presumption of personal liability (*m*). In the undermentioned case (*n*) West, J., said: "In the present case Messrs. Mackinnon, Mackenzie & Co. say they made the agreement 'as agents' for the owners of the steamer *Onkdale*. No case has yet apparently decided that this would be enough to exclude their personal responsibility and the corresponding right to sue. In this charter-party, however, there is more than this." But if the agent appears, on the face of the written contract, to be liable personally, he will not be allowed to adduce oral evidence to show that he did not contract in his personal capacity (*o*).

Where the usual presumption is negatived by an agent contracting for an unnamed principal in such terms as to exclude his own liability, he may nevertheless show afterwards, if the fact be so, that he is himself the principal (*p*), or the other party on discovering that fact may sue him (*q*).

Where an ancestral business is carried on by some only of the members of a joint Hindi family as managers, a contract made by the managers in their own name may be enforced by them personally without joining the other members as parties to the suit. The managing members are in such a case in the position of undisclosed partners (*r*).

(*k*) *Michael v. Briggs* (1890) 14 Mad. 362. It is needless to refer to the authorities which settled the law in England.

(*l*) *Sopromonian Setty v. Heilgers* (1879) 5 Cal. 71; *Mackinnon v. Lang* (1881) 5 Bom. 584; *Hasonbhoy v. Clapham* (1882) 7 Bom. 51, 65.

(*m*) *Gubhoy v. Aveloon* (1890) 17 Cal. 449. See *Pater v. Gordon* (1872) 7 M. H. C. 82, 84, and *cp. Hough v. Manzanos*, note (*z*), p. 740, above. In the case of negotiable instruments, however, it would seem that no pre-

sumption of the agent's personal liability could arise at all if he signs his name to the instrument as agent: Negotiable Instruments Act, 1881, s. 28.

(*n*) *Mackinnon v. Lang* (1881) 5 Bom. 584, 588.

(*o*) *Sopromonian Setty v. Heilgers* (1879) 5 Cal. 71, 79. See Evidence Act, 1872, s. 92.

(*p*) *Schmalz v. Avery* (1851) 16 Q. B. 655; but see s. 236, p. 759, below.

(*q*) *Carr v. Jackson* (1852) 7 Ex. 382.

(*r*) *Opal Das v. Hari Das* (1905) 27 All. 361.

S. 230. A merchant in this country who orders goods through a firm of commission agents in Europe cannot hold the firm liable for failure to deliver the goods. The firm is in such a case merely an agent to place the merchant's order with the manufacturers in Europe, and by so doing it does not enter into any contract with the merchant for sale on behalf of the manufacturers, and it cannot therefore be held liable as an agent acting on behalf of undisclosed principals. The section refers to contracts "entered into by him on behalf of his principal", and the placing of the order does not amount to such a contract. The result is the same if the goods are ordered through a branch in this country of a firm of commission agents in another country (s).

A broker is an agent primarily to establish privity of contract between two parties. A broker when he closes a negotiation as the common agent of both parties usually enters it in his business book and gives to each party a note of the transaction which as given to the seller is the sold note and as given to the buyer the bought note. *Prima facie* a broker is employed to find a buyer or seller and as such is a mere intermediary. He is thus an agent to find a contracting party, and as long as he adheres strictly to the position of broker, his contract is one of employment between him and the person who employs him and not a contract of purchase or sale with the party whom he in the course of such employment finds. A broker may, however, make himself a party to the contract of sale or purchase, for he can go beyond his position of a negotiator or agent to negotiate and by the terms of the contract make himself the agent of his principal to buy or sell. Where he is merely an intermediary, he is not liable on the contract; but if he has entered into a contract of purchase or sale on behalf of his principal, the provisions of this section will apply (t). Thus if the principal is undisclosed, and

(s) *Mahomedally v. Schiller* (1889) 13 Bom. 470. The order to the defendants in this case was in the following form: "I hereby request you to instruct your agents to purchase for me (if possible) the undermentioned goods on my account and risk upon the terms stated below". The defendants' reply

was that they had received an intimation from their home firm that the order had been placed. See also *The Bombay United Merchants' Co., Ltd. v. Doolubram* (1888) 12 Bom. 50, 62.

(t) *Patiram v. Kankannarah Co., Ltd.* (1915) 42 Cal. 1050, 1065-66.

the note says "sold for you to my principals", i.e., I, your broker, have made a contract for my principals, the buyers, the broker is merely an intermediary, and he is not personally liable to his employer (u). For the same reason he is not liable if the contract says "bought for you from my principals" (v). But the broker is personally liable if the contract says "bought of you for my principals", for here the contract is one of purchase by the broker on behalf of undisclosed principals (w). S. 230.

Principal not liable.—There is a rather curious class of cases in which agreements have been entered into by promoters on behalf of companies intended to be, but in fact not yet, incorporated. In such a case the alleged principal has no legal existence, and the agent is held to have contracted on his own account in order that there may not be a total failure of remedy (x). Other cases have occurred where the principals were uncertain bodies of persons, or otherwise incapable of being sued by the description in the contract; but these would hardly be instructive in the different circumstances of Indian society (y), and it must be remembered that decisions turning on or involving the "solemnity" of an English deed are to be used here with great caution.

Deed executed in agent's name.—According to English law, no person who is not a party to a deed can be sued upon the contract contained in it. But it seems that the technical rule of English law has no operation in this country, so that the principal may sue and be sued upon a deed even though it may not have been executed in his name (z).

(u) *Southwell v. Bowditch* (1876) L.R. 1 C. P. D. 374.

(v) *Patiram v. Kankanarrak Co.*, Ld. (1915) 42 Cal. 1050.

(w) *Southwell v. Bowditch* (1876) L. R. 1 C. P. D., 374, at p. 379.

(x) *Kelner v. Baxter* (1866) L. R. 2 C.P. 174; *Re Empress Engineering Co.* (1880) 16 Ch. Div. 125; *Lakshmishankar v. Motiram* (1904) 6 Bom L. R. 1106.

(y) *In re Furnivall v. Coombes* (1843) 5 M & Gr. 736; 63 R.R. 453, an express

term that a covenant should not bind the covenantors personally was held to be inoperative because no one else could be bound; followed, *Walling v. Lewis* [1911] 1 Ch. 414.

(z) *Chinnaramanuja v. Padmanabha* (1896) 19 Mad. 471, dissenting from *Rajoonathulas v. Morarji* (1892) 16 Bom. 568. The opinion of the Madras Court is evidently preferable on grounds of convenience.

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Sovereign States as principals.—Sovereign States and their rulers would seem to come within the description of possible principals who cannot be sued; but there is a special rule for this case, and it is settled, for sufficient reasons of good sense and policy, that an agent contracting even in his own name on behalf of a Government is not to be considered as personally a party to the contract. No man would accept public office at such risk as a different rule would involve (a). As regards British India the law is that a foreign or native ruler may be sued in a competent Court in India in certain cases with the consent of the Governor-General in Council. Where no such consent is given, it has been held that a suit may be brought against the agent appointed by the native ruler for the purposes of the business in respect of which the suit is brought (b).

Negotiable Instruments.—Where a negotiable instrument is signed by a duly authorised agent in the name of his principal, the latter may be rendered liable on the instrument (c). But where the instrument is signed by the agent in his own name without indicating thereon that he signs as agent, or that he does not intend thereby to incur personal responsibility, he is liable personally except to those who induced him to sign upon the belief that the principal only would be held liable (d). The question may arise whether a principal whose name does not appear on a negotiable instrument can be made liable on the instrument as a party thereto. In England it is provided by the Bills of Exchange Act that the principal is not liable in such a case (e). There is no specific provision in the Negotiable Instruments Act, and it is a question whether, having regard to ss. 233 and 234 (pp. 754, 756 below), the principal cannot be proceeded against upon a negotiable instrument executed by an agent in his own name (f). In the case of a joint Hindu family,

(a) *Gidley v. Lord Palmerston* (1822)(d) *Ib.*, s. 28.3 Brod. & B. 275; 24 R. R. 668; see this and other authorities collected in *Palmer v. Hutchinson* (1881) 6 App. Ca. at p. 626; *Grant v. Secretary of State for India* (1877) 2 C. P. D. at p. 461.

(e) S. 23: "Bills and notes form an exception to the ordinary rule that when a contract is made by an agent in his own name evidence is admissible to charge the undisclosed principal, though not to discharge the agent": Chalmers thereon, at pp. 68, 69.

(b) *Abdul Ali v. Goldstien* (1910) *Funj. Rec.* no. 43.

(c) Negotiable Instruments Act, 1881, s. 27.

(f) *Krishna v. Krishnasami* (1900) 23 *Mad.* 597, 600.

it has been held that the payee may sue not only the maker, but his coparceners, provided the plaint includes a demand in respect of the original debt, and the debt was contracted for the benefit of the family (g). But the liability of the other coparceners in such a case does not rest on any principles of agency, but upon the personal law to which the parties are subject (h). S. 230.

Defendant's rights where agent sues in own name.—Where an agent sues in his own name on a contract made on the principal's behalf, statements made by the principal, as well as his own statements, may be used in evidence against him as admissions (i), and the defendant is entitled to avail himself of any defence, including that of set-off, which would have been available against the agent if he had been suing on a contract made on his own behalf, even though the defence would not have been available in an action by the principal on the contract (j). The defendant is also entitled to discovery to the same extent as if the principal were a party to the proceedings (k).

Effect of settlement with principal.—As a general rule, the right of an agent to sue personally on a contract made on the principal's behalf ceases on the intervention of the principal, and a settlement between the principal and the third party constitutes a good defence to an action by the agent (l). But if the agent has a lien on the subject-matter of the contract as against the principal, his right to sue has priority to the right of the principal as long as the claim secured by the lien remains unsatisfied (m); and in such a case the defendant cannot in an action by the agent set up any settlement with or set-off against the principal which would operate to the prejudice of the claim secured by the lien (n), unless the agent is estopped

(g) *Ibid.*(h) *Ib.*, pp. 604, 607.(i) *Smith v. Lyon* (1843) 3 Camp. 465; 14 R. R. 810.(j) *Gibson v. Winter* (1833) 5 B. & Ad. 96; 39 R. R. 411 (in an action by a policy broker, a payment by way of set-off was held a good defence, though it would not have been a good payment as against the principal).(k) *Willis v. Baddeley* [1892] 2 Q. B.

321.

(l) *Atkinson v. Cotesworth* (1825) 3 B. & C. 647; 27 R. R. 450; *Rogers v. Hadley* (1861) 2 H. & C. 227.(m) *Drinkwater v. Goodwin* (1775) Cowp. 251 (sale by factor in his own name of goods on which he had a lien for advances).(n) *Atkins v. Amber* (1796) 2 Esp. 493 (defendant not entitled, in action by broker for price of goods sold in own

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by his conduct, or by the terms of the contract, from disputing the validity of the settlement or right of set-off (o).

231.—If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract ; but the other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been principal.

Rights of parties to a contract made by agent not disclosed.

If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent was not a principal, he would not have entered into the contract.

“Discloses himself.”—The High Court of Bombay has expressed the opinion that the right of the third party to repudiate the contract under the second paragraph arises only where the principal himself makes the disclosure, and that it does not arise where the disclosure is made by some other person or the information reaches him from some other source (p).

232.—Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such

Performance of contract with agent supposed to be principal.

name on which he had made advances, to set off debt due from principal); *Robinson v. Rutter* (1855) 4 E. & B. 954; 99 R. R. 849 (action by auctioneer for price of goods sold; plea that defendant had paid the principal hold bad); *Grice v. Kenrick* (1870) L. R. 5 Q.B. 340 (action by auctioneer for price of goods sold; settlement with the principal which did not operate to the prejudice of the plaintiff held a good defence).

(o) *Coppin v. Walker* (1816) 2 Marsh. 497; 17 R. R. 505; *Coppin v. Craig* (1816) 2 Marsh. 501; 17 R. R. 508 (in these cases an auctioneer, having sold goods which were described as the property of a named principal, allowed purchasers to take the goods away without giving them notice not to pay the principal).

(p) *Lakshumandas v. Lane* (1904) 32 Bom. 358. The reference to *Karim*

performance subject to the rights and obligations subsisting between the agent and the other party to the contract. S. 232.

Illustration.

A., who owes 500 rupees to B., sells 1,000 rupees worth of rice to B. A. is acting as agent for C. in the transaction, but B. has no knowledge nor reasonable ground of suspicion that such is the case. C. cannot compel B. to take the rice without allowing him to set off A.'s debt.

Rights of Undisclosed Principal.—Like previous learned commentators on these two sections, we are at a loss to discover any difference between them, except that s. 231 expresses the same matter more fully. There is a clause very like s. 232 in the Indian Law Commissioners' draft, but nothing corresponding to s. 231. We are inclined to conjecture that s. 231 was an amendment intended to replace the section as first drawn, and that finally both clauses were retained either by inadvertence or by way of abundant caution. The difficulty thus raised is not serious, for there is no doubt about the substance of the law; but it has been judicially discussed.

In *Premji v. Madhowji* (q) Marriott J. said: "I do not think s. 232 is a repetition of the first paragraph of s. 231. It is, I think, a qualification of the first portion of that paragraph which gives a principal a general right to enforce a contract entered into by his agent. S. 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party."

It is submitted, however, that the ground is completely covered by the saving clause in the first paragraph of s. 231, and no further qualification is added by s. 232. The illustration to s. 232 would have been quite as appropriate to s. 231. In the case now cited it was contended that the object of s. 232 was to reproduce the law as supposed to be laid down in *Thomson v. Davenport* (r) and *Armstrong v. Stokes* (s), namely, that the right of the other contracting party

Chowkidar v. Sundar Beica (1896) 24 Cal. 207, at l. 3 of p. 362 of the report is wrong. The correct reference should be *Grenon v. Lachmi Narain* (1896) 24 Cal. 8, at p. 10.

(q) (1880) 4 Bom. 447, 456.

(r) (1829) 9 B. & C. 78; 32 R. R. 578; 2 Smith's L. C., 11th ed. 379.

(s) (1872) L. R. 7 Q. B. 598.

S. 232. to hold the principal liable is subject to the qualification that the principal has not paid the agent, or that the state of accounts between the principal and agent has not been altered to the prejudice of the principal. But this contention did not prevail, and it was said that the only qualification imposed upon the rights of the other contracting party was that specified in s. 234. Almost at the same time, in fact, the Court of Appeal in England (*t*), overruling, or refusing to accept literally, the wider dicta in *Thomson v. Davenport* and *Armstrong v. Stokes* (*u*), approved the more guarded judgment of Parke, B., and the Court of Exchequer in *Heald v. Kenworthy* (*v*). "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money on the faith that the agent and seller have come to a settlement on the matter, or if any representation to that effect is made by the seller either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal. It would be *unjust* (*w*) for him to do so. But I think that there is no ease of this kind where the plaintiff has been precluded from recovering, unless he has in some way contributed either to deceive the defendant or to induce him to alter his position." Otherwise, "if a person orders an agent to make a purchase for him, he is bound to see that the agent pays the debt; and the giving the agent money for that purpose does not amount to payment, unless the agent pays it accordingly."

On similar grounds, if the principal represents the agent as principal he is bound by that representation. So if he stands by and allows a third person innocently to treat with the agent as principal he cannot afterwards turn round and sue him in his own name (*x*).

The result is that these two sections and s. 234, taken together, fairly represent modern English law as understood in the Court of Appeal.

(*t*) *Irvine v. Watson* (1880) 5 Q. B. R. 800, 805.
Div. 414, 417.

(*u*) See foregoing notes. The authority of *Armstrong v. Stokes* is reduced to that of a decision on special circumstances.

(*v*) (1855) 10 Ex. 739, 746; 102 R.

(*w*) Referring to some of the language used in *Thomson v. Davenport*.

(*x*) *Ferrand v. Bischoffsheim* (1858) 4 C. B. N. S. 710, 717; 114 R. R. 903, 913. The decision shows that nothing less than positive misleading will do.

Equities between Agent and Third Party.—An undisclosed principal coming in to sue on the contract made by the agent must take the contract, as the phrase goes, subject to all equities; that is, the third party may use against the principal any defence that would have availed him against the agent (*y*). “Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it, subject to this qualification, that the person who deals with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent” (*z*). “The law with respect to the right of set-off by a third person dealing with a factor who sells goods in his own name and afterwards becomes bankrupt is well established by *George v. Clagett* (*a*). That rule is founded on principles of common honesty. One who satisfies his contract with the person with whom he has contracted ought not to suffer by reason of its afterwards turning out that there was a concealed principal” (*b*).

S. 232.

The application of the rule is limited to liquidated demands (*c*); but it “is not confined to the sale of goods. If A. employs B. as his agent to make any contract for him, or to receive money for him, and B. makes a contract with C. or employs C. as his agent, if B. is a person who would be reasonably supposed to be acting as a principal, and is not known or suspected by C. to be acting as an agent for any one, A. cannot make a demand against C. without the latter being entitled to stand in the same position as if B. had in fact been a principal. If A. has allowed his agent B. to appear in the character of a principal he must take the consequences” (*d*).

In England it is not necessary for the third party who dealt with the agent as a principal to go beyond showing that he believed him to be a principal. Means of knowledge or “reason to suspect”

(*y*) *George v. Clagett* (1797) 7 T. R. 359; 4 R.R. 462; *Sims v. Bond* (1833) 5 B. & Ad. 389, 393; 39 R. R. 511, 515.

(*z*) Willes, J., 14 C.B.N.S. at p. 589.

(*σ*) Note (*y*) above.

(*b*) *Turner v. Thomas* (1871) L.R. 6 C. P. 610, 613, per Willes, J.

(*c*) *Ib.* *

(*d*) *Montagu v. Forwood* [1893] 2 Q. B. 350, 355, per Bowen, L.J. Here the defendants were employed by apparent principals, who were in fact agents for the plaintiffs, to collect a general average contribution from underwriters.

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32, 233.

appears to be material only as tending to negative the alleged belief (e). The words of both ss. 231 and 232, however, are quite clear on this point. But there must be actual belief that one is dealing with a principal. Ignorance or doubt whether the apparent principal is a principal or an agent is not enough; for the ground of the rule is that the agent has been allowed by his undisclosed principal to hold out himself as the principal, and the third party has dealt with him as such (f).

The second paragraph of s. 231 is really a branch of the general rule that agreements involving personal considerations of skill, confidence, or the like are not assignable or transferable.

Right of person
dealing with agent
personally liable.

233.—In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable.

Illustration.

A. enters into a contract with B. to sell him 100 bales of cotton, and afterwards discovers that B. was acting as agent for C. A. may sue either B. or C., or both, for the price of the cotton.

In cases where the agent is personally liable.—As to the cases where an agent is personally liable, see s. 230 and commentary thereon, p. 738, above.

Creditor's election.—A person who has made a contract with an agent may, if and when he pleases, look directly to the principal, unless by the terms of the contract he has agreed not to do so, and that whether he was or was not aware when he made the contract that the person with whom he was dealing was an agent only, and not the less so in cases where the agent is personally liable, for the law which superadds the liability of the agent does not detract from the liability of the principal (g). A company is, therefore, liable for moneys advanced in the course of voluntary liquidation to the liquidator

(e) *Borries v. Imperial Ottoman Bank* is final.
(1873) L. R. 9 C. P. 38.

(g) *Calder v. Dobell* (1871) L. R. 6 C. P. 486. The question was whether the circumstances showed an election to charge the agent exclusively.

(f) *Cooke v. Eschellby* (1887) 12 App. Ca. 271. The decision has been criticised, but, being in the House of Lords,

authorised by the company to borrow for the purposes of the winding up (h). And, upon the same principal, a loan made to the secretary, treasurer, and agent of a company authorised to raise moneys for the company may be recovered from the company (i). But when once the creditor has elected to sue the agent, and sued him to judgment, he cannot afterwards bring a second action against the principal, though the judgment against the agent may not have been satisfied (j), and though the creditor was not aware of the existence of a principal when he sued the agent (k). But where the suit against the agent is dismissed the creditor may subsequently bring a fresh suit against the principal, the reason being that nothing short of a judgment against the agent could amount to a binding election on the part of the creditor to abandon the right to proceed against the principal (l).

There may, however, be a deliberate intention shown from the beginning of the transaction, or at some later stage, to give credit to the agent alone: in that case there is no right of action against the principal (m); and the third party must elect to sue an undisclosed principal, if he means to preserve his rights against him, within a reasonable time after ascertaining him (n). Except where the agent has been sued to judgment, the question whether the creditor has elected to give credit to him to the exclusion of the principal is one of fact (o). Invoicing the goods to the agent and calling upon him to pay for them (o), or taking and renewing his acceptances in payment of the price (p), are not conclusive of such an election,

(h) *In re Ganges Steam Car Co.* Mad. 392, citing *Curtis v. Williamson* (1891) 18 Cal. 31. (1874) L. R. 10 Q. B. 57.

(i) *Purmanundass v. Cornack* (1881) 6 Bom. 326. (m) *Paterson v. Gandasequi* (1812) 15 East, 62; *Addison v. Gandasequi* (1812) 4 Taunt. 574; 13 R. R. 368, 689, and in 2 Sm. L. C.

(j) *Shielal Motilal v. Birdichand* (1917) 19 Bom. L. R. 370; *Bir Bhaddar v. Sarju Prasad* (1887) 9 All. 681; *Priestly v. Fernie* (1865) 3 H. & C. 977; and see L. R. 6 C. P. at p. 499, and *Morel v. Westmoreland* [1904] A. C. 11; *French v. Howie* [1906] 2 K. B. 674. (n) *Smethurst v. Mitchell* (1859) 1 E. & E. 622; 117 R. R. 374. *Cp. Davidson v. Donaldson* (1882) 9 Q. B. D. 623. (o) *Calder v. Dobell* (1871) L. R. 6 C. P. 486.

(k) *Shielal Motilal v. Birdichand* (1917) 19 Bom. L. R. 370, 380-381. (p) *Robinson v. Read* (1829) B. & C. 449; *Whitwell v. Perrin* (1858) 4

(l) *Raman v. Vairavan* (1883) 7 C. B. N. S. 412; 114 R. R. 735.

8a.
233-235.

nor are any legal proceedings short of suing the agent to judgment (q). The next section is apparently intended to cover all forms of election, whether by estoppel or otherwise.

234.—When a person who has made a contract with an agent induces the agent to act upon the belief that the principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

Consequence of inducing agent or principal to act on belief that principal or agent will be held exclusively liable.

This section seems to be derived from S. A. § 291, rather than from any definite English authority. We may take it, however, as giving the true reason of a rule which, about the time when the Act was passed, was too widely laid down in England, but was afterwards corrected in the Court of Appeal (see the commentary on ss. 231, 232, pp. 750, 751, above).

235.—A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

Liability of pretended agent.

Implied warranty of authority.—This section is in accordance with the English law as established by *Collen v. Wright* (r). It applies not only to the case of a person who represents that he has authority from another when he has no authority whatever, but to the case of a person who represents that he has a certain authority from another when he has authority of another description (s). The duty is grounded on an implied warranty by the agent that he has authority, and the action, being in contract, lies even if the agent

(q) *Curtis v. Williamson* (1874) L.R. 10 Q.B. 57; *Morgan v. Couchman* (1853) 14 C.B. 100; 98 R. R. 555. *Hasonbhoy v. Clapham* (1882) 7 Bom. 51, 66.
(s) *Ganpat Prasad v. Sarju* (1911) 9 (r) (1857) 7 E. & B. 301, in Ex. Ch. All. L. J. 8.
8 E. & B. 647; 110 R. R. 602, 611; see

honestly believed he had authority, and against executors (in which * S. 235. case an action in tort for deceit does not lie in England). The doctrine, which was a novelty half a century ago, has been fully confirmed by later authorities and by the House of Lords (*l*). An agent who purports to report the other party's intentions does not thereby make himself that party's agent to deal with his original principal. It may be a breach of his original duty as agent if his report is incorrect, but he is not liable under the rule in *Collen v. Wright* on an implied warranty of authority from the other party to conclude the transaction (*u*).

The word "untruly" may perhaps imply (as is held in England) that the representation must be of matter of fact (*v*).

A public servant acting on behalf of the Government is not deemed to warrant his authority any more than to make himself personally liable on the contract (*w*), and for the same reason of policy.

If a man goes through the form of contracting as an agent, but warns the other party that he has at the time no authority, he is obviously not liable under this section (*x*). It seems a nice question whether there is in such a case anything which the named principal can ratify, or anything more than an offer to him, liable to revocation like any ordinary proposal.

Representation must be effective.—The liability of a pretended agent under this section does not arise, unless the representation that he is the agent of another is false, and also induces the person to whom the representation is made to deal with him as such agent. A representation by the defendant to the plaintiff that she is the duly authorised agent of her minor son does not render her liable under this section, if the plaintiff knows that the son is a minor.

(*l*) *Starkey v. Bank of England* (1873) L. R. 8 C.P. 427; *Shet Manibhai* [1903] A. C. 114. It is needless for Indian purposes to cite intermediate cases. *v. Bai Rupaliba* (1899) 24 Bom. 166, 170. As to the distinction between representations of fact and of law, see p. 124 above.

(*u*) *Chr. Salvesen & Co. v. Rederi Aktiebolaget Nordstjernen* [1905] A.C. 302. (*w*) *Dunn v. Macdonald* (1897) 1 Q. B. 555, C.A.

(*v*) *Beattie v. Lord Ebury* (1872) L. R. 7 H. L. 102; *Weeks v. Propert* (*x*) *Halbot v. Lens* [1901] 1 Ch. 344.

- S. 235. 'For a minor cannot appoint an agent (s. 183, p. 660, above), and consequently no warranty such as would support a suit could arise out of such a representation (y).

Measure of Damages.—In England, the action being founded on contract, and not on tort, the measure of damages is the loss sustained as the consequence of the breach of the implied warranty. In other words, the person acting on the misrepresentation is entitled not only to recover any loss actually sustained through being misled, but also any profit which he would have gained if the representation had been true (z). Thus, if an agent contracts, without authority, to buy goods at a price in excess of their value, and the principal repudiates the contract as unauthorised, the measure of damages recoverable against the agent is the difference between the contract price and the market value of the goods (r). Similarly, where an agent, who was instructed to apply for shares in a certain company, applied for shares in another company by mistake, and they were allotted to the principal, who repudiated them shortly afterwards in the winding up of the company, it was held that, the principal being solvent and the shares valueless, the measure of damages payable by the agent to the liquidator was the full amount payable on the shares (b). If the third person reasonably (c) takes proceedings against the principal for the enforcement of the unauthorised transaction, the damages recoverable against the agent include the costs and expenses incurred by the third person in respect of the proceedings (d).

It is open to question whether in India the compensation recoverable under the section will be assessed on the same principle.

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- (y) *Shet Manilhai v. Bai Rupaliba* (1899) 24 Bom. 166, citing *Beattie v. Lord Ebury*, L. R. 7 Ch. 777; L. R. 7 H. L. 102. were held to be too remote.
- (a) *Simons v. Patchett* (1857) 7 E. & B. 568; 110 R. R. 730.
- (b) *Ex parte Panmure* (1883) 24 Ch. Div. 387.
- (c) See *Pow v. Davis* (1861) 1 E. & S. 220; 124 R. R. 530.
- (d) *Spedding v. Nevell* (1869) L.R. 4 C. P. 212; *Hughes v. Grewme* (1864) 33 L. J. Q. B. 335.
- (z) *Firbank v. Humphreys* (1886) 18 Q. B. Div. 54; *Richardson v. Williamson* (1871) L. R. 6 Q. B. 276; *Meek v. Wendt* (1888) 21 Q. B. D. 126; *Godwin v. Francis* (1870) L. R. 5 C. P. 295, is a case where the damages claimed

The language used seems more appropriate to an action in the nature of an action of deceit than to one founded on a warranty (e).

See.
235, 236.

Limitation.—It has been held by the High Court of Madras that a suit for damages against a person for untruly representing himself to be the agent of another is governed by art. 115 of Sch. I of the Limitation Act (f).

236.—A person with whom a contract has been entered into in the character of agent is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

English authorities make a distinction in this matter between contracts on behalf of a named principal and those in which the principal is not named. In the former case the agent cannot substitute himself for the principal (g), though the other party may by words or by conduct, such as acting on the contract after knowledge that the nominal agent was the real principal, deprive himself of the right to object; and it has been suggested, though not decided, that the agent might be allowed to take up the contract for himself on condition of being subject to all defences available against either himself or the named principal (h). But where the principal is not named the third party is contracting with the principal, whoever he may be, and there is no obvious reason why he should be presumed willing to deal with any unknown person in the world, provided that he is capable of being sued, and unwilling to deal with the nominal agent, the only person he knows in the matter. Accordingly a person who made a charter-party as agent for an unnamed freighter has been allowed to show that he was the freighter himself (i).

It does not seem possible, however, to read any such distinction into the perfectly general language of the present section; and,

(e) See *Vairavan Cheltiar v. Avicha* S. 383.

Cheltiar (1915) 38 Mad. 275, 278.

(h) *Rayner v. Grole* (1846) 15 M. &

(f) *Vairavan Cheltiar v. Avicha*

W. 359; 71 R. R. 709.

Cheltiar (1915) 38 Mad. 275.

(i) *Schmalz v. Avery* (1851) 16

(g) *Bickerton v. Burrell* (1816) 5 M. &

Q. B. 655; 83 R. R. 653.

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236, 237.

indeed, the English rule is not clear of doubt, as the authorities (including some dicta which it would be useless to cite here) are not uniform, and the rule has never been settled by a Court of appeal. The High Court of Calcutta has recently held that this section is not restricted to cases where an agent purports to act for a named principal (*j*). If a person professing to act as an agent for an undisclosed principal enters into a contract with another, and there is no undisclosed principal in fact, the present section at once applies, and he cannot sue on the contract (*k*).

Conversely, where a man has contracted in writing in terms importing that he is the sole principal, *e.g.*, made a charter-party "as owner of the ship A.," another person cannot be allowed to sue on the contract as an undisclosed principal (*l*).

237.—When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations if he has by his words or conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority.

Liability of principal inducing belief that agent's unauthorised acts were authorised.

Illustrations.

(a) A. consigns goods to B. for sale, and gives him instructions not to sell under a fixed price. C., being ignorant of B.'s instructions, enters into a contract with B. to buy the goods at a price lower than the reserved price. A. is bound by the contract.

(b) A. entrusts B. with negotiable instruments indorsed in blank. B. sells them to C. in violation of private orders from A. The sale is good.

Ostensible authority.—This section must, in point of fact, overlap s. 188 (p. 664, above) in many cases, but the principles are distinct. Under s. 188 the question is of the true construction to

(j) *Sewdutt Roy Maskara v. Nahapiet* (1907) 34 Cal. 628.

(k) *Ramji Das v. Janki Das* (1912) 39 Cal. 802.

(l) *Humble v. Hunter* (1848) 12 Q. B. 310; 76 R.R. 291. But this does

not extend to the term "charterer," which is consistent with agency for an undisclosed principal: *Rederi Aktienbolaget Transatlantic v. Fred. Drughorn* [1918] 1 K. B. 394, C.A., affirmed in H. L. [1919] A.C. 203.

be put upon a real, though perhaps not verbally expressed, authority. **S. 237.** Here the liability is by estoppel, and independent of the apparent agent having any real authority at all; the question is only whether he was held out as being authorised; and this includes the case of secret restrictions on any existing authority of a well-known kind. It is a "well-established principle that, if a person employs another as an agent in a character which involves a particular authority, he cannot by a secret reservation divest him of that authority" (m). "Good faith requires that the principal should be held bound by the acts of the agent within the scope of his general authority, for he has held him out to the public as competent to do the acts and to bind him thereby": S. A. § 127. "If a person authorise another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. . . . It is clear that he [the agent] may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. . . . If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody?" (n). Similarly, where a transaction undertaken by an agent on behalf of his principal is within his express authority the principal is bound without regard to the agent's motives, and and inquiry whether the agent was abusing his authority for his own purposes is not admissible (o).

Very many illustrations of the principle are to be found in the English authorities, of which the following may be given as typical examples (p). Where a principal wrote to a third person saying he had authorised the agent to see him, and, if possible, to come to amicable arrangement, and gave the agent instructions not to settle

(m) Cockburn, C.J., in *Edmunds v. Bushell* (1865) L. R. 1 Q. B. 97, 99.

(n) Lord Ellenborough, C.J., *Pickering v. Busk* (1812) 15 East, 38; 13 R. R. 367, 366. *Cp. s. 108, Exception 1, p. 532 above.*

(o) *Hambro v. Burnard* [1904] 2 K. B. 10, C. A., following *Bank of Bengal v. Fagan* (1849) 7 Moo. P. C. 61, 74; 83 R. R. 15, 24.

(p) See Bowstead on Agency, 6th ed., pp. 270 *eqq.*, 300.

8. 237. for less than a certain amount, it was held that he was bound by a settlement by the agent for less than that amount, the third person having no knowledge of the verbal instructions (g). An agent was authorised, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business, and it was held that the principal was bound by a loan on such exceptional terms made by a third person who had no notice that the agent was exceeding his authority, although no emergency had in fact arisen (r). Where a solicitor was authorised to sue for a debt, it was held that a tender to his managing clerk was equivalent to a tender to the client, though the clerk was forbidden to receive payment, he not having disclaimed the authority at the time of the tender (s). A broker having on several occasions been permitted by his principal to draw bills in his own name for the price of goods sold, the principal was held bound by a payment to the broker by means of such a bill, accepted by a purchaser who had previously paid in a similar manner for goods bought by him (t). By a charter-party it is provided that the shipmaster, who is appointed by the owners, shall act as agent of the charterers only in signing bills of lading and ordering necessaries. The owners are liable on bills of lading signed by the master, and for the price of necessaries ordered by him, if the persons shipping the goods or supplying the necessaries have no notice of the charter-party (u).

Illustration (b) seems to be founded on S. A. § 228: "If an agent is entrusted with the disposal of negotiable securities or instruments, and he disposes of them by sale or pledge or otherwise, contrary to the orders of his principal, to a *bonâ fide* holder without notice, the principal cannot reclaim them" (v). It must be under-

(g) *Trickett v. Tomlinson* (1863) 13 C.B.N.S. 663; 134 R.R. 688. See also *National Bolivian Navigation Co. v. Wilson* (1880) 5 App. Cas. 176, 209; *Whitehead v. Tuckett* (1812) 15 East. 400; 13 R. R. 509.

(r) *Montaignac v. Shilla* (1890) 15 App. Cas. 357. And see *Bryant v. Quebec Bank* [1893] A. C. 179.

(s) *Moffat v. Persons* (1814) 1 Marsh 55; 15 R. R. 506.

(t) *Townsend v. Inglis* (1816) Holt, 278; 17 R. R. 636. And see *Hazard v. Treadwell* (1730) 1 Str. 506.

(u) *Manchester Trust v. Furness* [1895] 2 Q. B. 539; *The Great Eastern* (1868) L. R. 2 Ad. & E. 88.

(v) See *London Joint Stock Bank v. Simmons* [1892] A. C. 201; *Goodwin v. Roberts* (1876) 1 App. Ca. 476.

stood in the illustration that the instruments are not handed to B. 8. 237.
merely for safe custody.

The Privy Council case of *Ram Pertab v. Marshall (w)*, which, however, was not decided with reference to the section, affords an additional illustration. In that case the principal was held liable upon a contract entered into by his agent in excess of his authority, the evidence showing that the contracting party might honestly and reasonably have believed in the existence of the authority to the extent apparent to him.

The same principle is applied in the class of cases where it is held that persons dealing with incorporated companies, though they must take notice at their peril of disabilities imposed on the corporation by its special Act of Parliament, memorandum, or other public document of constitution, are entitled to assume that the directors or managers are duly exercising their authority according to the company's internal regulations. But this subject is much too special to be pursued in a commentary like the present (*x*).

Notice of excess of authority.—No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that the act is unauthorised. This proposition is so obvious that it would be superfluous to cite authorities, several of which relate to dealings with money and negotiable instruments (*y*), in support of it. One case, however, where the notice was only constructive, may be mentioned. An agent, who was appointed by a power of attorney, borrowed money on the faith of a representation by him that the power gave him full authority to borrow, and misapplied it. The agent produced the power, which did not authorise the loan, but the lender did not read it, and made the advance in reliance on the agent's representation. It was held that the lender must be taken to have had notice of the terms of the power, and that the principal was not bound by the loan (*z*).

"On behalf of his principal."—A principal is not bound by any act done by his agent which he has not in fact authorised, unless

(w) (1899) 26 Cal. 701.

pp. 296—299.

(x) See Pollock on Contract, Note D, in Appendix at pp. 737—740.

(z) *Jacobs v. Morris* [1902] 1 Ch. 816.

(y) See Bowstead on Agency, 6th ed.,

86.
37, 238.

it is done in the course of the agent's employment on his behalf (a), and is within the scope of the agent's apparent authority (b).

238.—Misrepresentations made, or frauds committed,

Effect, on agree-
ment, of misrep-
resentation or fraud
by agent.

by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed by the principals ; but misrepresentations made, or frauds committed, by agents, in matters which do not fall within their authority, do not affect their principals.

Illustrations.

(a) A., being B.'s agent for the sale of goods, induces C. to buy them by a misrepresentation, which he was not authorised by B. to make. The contract is voidable as between B. and C. at the option of C.

(b) A., the captain of B.'s ship, signs bills of lading without having received on board the goods mentioned therein. The bills of lading are void as between B. and the pretended consignor.

Course of employment.—The accordance of this section with the modern common law is well shown in a recent judgment delivered in the Judicial Committee by Lord Lindley : “The law upon this subject cannot be better expressed than it was by the acting Chief Justice [of New South Wales] in this case. He said : ‘Although the particular act which gives the cause of action may not be authorised, still, if the act is done in the course of employment which is authorised, then the master is liable for the act of his servant.’ This doctrine has been approved and acted upon by this Board in *Mackay v. Commercial Bank of New Brunswick* (c), *Swire v. Francis* (d) ; and the doctrine is as applicable to incorporated

(a) *McGowan v. Dyer* (1873) L. R. 8 Q. B. 141, where the managing director of a company obtained payment of a private debt out of certain funds, in breach of an understanding between the debtor (who was also indebted to the company) and a surety for his debt to the company, and it was held, in an action by the company against the

surety, that the company was not responsible for the conduct of the managing director in the matter.

(b) For illustrations, see *Bowstead on Agency*, 6th ed., pp. 277–284. The rule is too well recognised to need authorities in support.

(c) (1874) L. R. 5 P. C. 394.

(d) (1877) 3 App. Ca. 106.

companies as to individuals. All doubt on this question was removed by the decision of the Court of Exchequer Chamber in *Barwick v. English Joint Stock Bank* (e), which is the leading case on the subject. It was distinctly approved by Lord Selborne, in the House of Lords, in *Houldsworth v. City of Glasgow Bank* (f), and has been followed in numerous other cases" (g).

In the passage here referred to as now the leading authority, Willes, J., delivering the judgment of the Exchequer Chamber, said:

"With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved (h). That principle is acted upon every day in running down cases. It has been applied also [in various cases of trespass, false imprisonment by servants of corporations acting in supposed execution of their duties under by-laws, and the like]. In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of the master to place him in" (i). The words "for the master's benefit," which occur in this judgment, were applicable to the case before the Court, but must not be taken as restricting the scope of the rule, though there was for some time considerable authority for that reading. If the act belongs to an authorized class, it is not material whether the agent intends the principal's benefit or not, nor whether the principal in fact derives any benefit. A solicitor's managing clerk, having authority to transact conveying business on behalf of the firm, took a client's instructions to

(e) (1867) L. R. 2 Ex. 259.

(h) See *Laugher v. Pointer* (1826)

(f) (1880) 5 App. Ca. at p. 326.

5 B. & C. 547, at p. 554, 29 R. R. at

(g) *Citizens' Life Assurance Co. v.*

pp. 320, 321.

Brown [1904] A. C. 423, 427.

(i) L. R. 2 Ex. at pp. 265, 266.

- §. 238. sell some property (by his own advice, given with fraudulent intent) and got the deeds from her (which he might properly have done). Then he procured her execution of instruments, being in fact conveyances to himself, which the client supposed (as intended by him) to be merely formal papers; and having thus obtained the means of making an apparently good title in his own name, he dealt with the property for his own purposes. The House of Lords (j) held that this was a fraud committed by the manager in the course of his employment, for which the principal was answerable. It is clear from the judgments that the rule applies to ostensible as well as to actual authority.

Misrepresentation which will make the principal liable to an action for trespass, deceit, or other substantive wrong will, of course, be a sufficient cause for the other party to avoid an agreement induced by it.

Illustration (a) seems to include both the case of the agent knowing but the principal not knowing the truth of the matter misrepresented, and the less obvious one of the agent making a statement without authority, but believing it to be true, while the principal in fact knows it not to be true. In the latter case it was formerly held that a contract thus induced was not voidable on the ground that it was obtained by the principal's fraud; but this decision, which was not unanimous, and has been constantly discussed since, is no longer of any practical (k) authority.

Illustration (h) is taken from a modern decision where the real question was as to the extent of the master's apparent authority. It would perhaps have been more appropriate to §. 237. "The authority of the master of a ship is very large, and extends to all acts that are usual and necessary for the use and enjoyment of the ship, but is subject to several well-known limitations.....With regard to goods put on board, he may sign a bill of lading, and acknowledge the nature and quality and condition of the goods:"

(j) *Lloyd v. Grace, Smith & Co.* [1912] A. C. 716, reversing the decision of the C. A. [1911] 2 K. B. 489.

(k) *Cornfoot v. Fowke* (1840) 6 M. & W. 358; 55 R. R. 655. "I should be

sorry to have it supposed that *Cornfoot v. Fowke* turned upon anything but a point of pleading": Willes, J., L. R. 2 Ex. at p. 262, whose opinion is now universally followed.

but it is not usual for the master to give a bill of lading for goods not put on board. On the contrary, "the general usage gives notice to all people that the authority. . . . is limited to such goods as have been put on board" (l). S. 238.

It has lately been held by the House of Lords, for similar reasons, that a company's secretary who issues a false certificate of title to shares for his own purposes does not bind the company either as in fact exercising a general authority or by way of estoppel or "holding out" (m).

Fuller illustration of the kinds of acts done by agents which are deemed to be "in the course of their business for their principals" must be sought in special treatises on the Law of Principal and Agent, or in works on the Law of Torts.

The difficulties, which for some time were thought serious, arose partly from reluctance to hold any one answerable for fraud or wilful wrong to which he had not actually been consenting (n), partly from a fallacious opinion that it was impossible for a corporation to be liable for fraud or any other wrong which, in an individual, implies a specific belief or intention. It seems no harder to suppose a corporation capable of deceiving than to suppose it capable of being deceived; and if any innocent individual must answer for the fraud of his agent, there is really less hardship in applying the same rule to a corporation.

Admissions by Agent.--Section 18 of the Evidence Act provides that statements made by an agent to a party to any proceedings, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorised to make them, are admissions; and s. 21, that admissions are relevant and may be proved as against the person who makes them. The Contract Act is silent on the

(l) *Grant v. Norway* (1851) 10 C. B. at pp. 687, 689; 84 R. R. 760, 762.

(m) *Ruben v. Great Fingall Consolidated* [1906] A. C. 439, affirming the decision of the C. A. [1904] 2 K. B. 712. See also *Whitechurch v. Cavanagh* [1902] A. C. 117.

(n) See, for example, per Bramwell,

R., in *Swift v. Jewsbury* (1874) L. R. 9 Q. B. at p. 315. Lord Bramwell maintained to the last that a corporation could not be sued for malicious prosecution. See now *Citizens' Life Assurance Co. v. Brown*, cited note (g), p. 765, above.

- B. 238. subject; but the following brief statement of the English law, on which the provisions of the Evidence Act are evidently founded, may be usefully added here.

Statements made by an agent, though not expressly authorised, are admissible against the principal if they have reference to the business on which the agent is employed on the principal's behalf at the time when they are made, and are made, in the ordinary course of that employment (o). If an agent, employed to buy goods, acknowledges the receipt of them, that acknowledgment is evidence against the principal that they have been duly delivered (p). An acknowledgment by a wife, who manages a business on behalf of her husband, and purchases the goods required, as to the state of accounts between her husband and the persons supplying the goods, is evidence against the husband, and, if it is in writing and signed by the wife, will interrupt the operation of the Statute of Limitations (q). Where a station-master, in the ordinary course of his duty, made a statement to the police as to a porter having absconded, the statement was admitted in evidence against the company in an action with reference to a parcel which had been lost in transit (r). But it is not within the scope of an agent's implied or ostensible authority to make statements concerning bygone transactions; and, therefore, where a servant of a railway company, in answer to a question why he had not sent on certain cattle consigned to the company for carriage, said that he had forgotten them, it was held that this admission was not against the company in an action for damages for the delay, because it was made a week after the alleged cause of action arose (s). Nor are unauthorised statements made by an agent concerning matters in regard to which he is not employed

(o) *Ellis v. Thompson* (1838) 3 M. & W. 445; 49 R. R. 679. As to statements in bills of lading signed by ship-

master, see *McLean v. Fleming* (1871) 2 H. L. Sc. App. 128; *Smith v. Bedouin* S. K. Co. [1896] A. C. 70; *Lishman v. Christie* (1887) 19 Q. B. D. 333

(1) *Biggs v. Lawrence* (1789) 3 T. R. 454; 1 R. R. 740. And see *British Columbia, etc., Co. v. Nettleship* (1868) L. R. 3 C. P. 499 (letters written by

shipmaster admitted as evidence against the owners of the receipt of goods).

(q) *Anderson v. Sanderson* (1817) 2 Stark. 204; 19 R. R. 703. *Up. Mere-dith v. Footner* (1843) 11 M. & W. 202; 63 R. R. 541.

(r) *Kirkstall Brewery v. Furness Railway Co.* (1874) L. R. 9 Q.B. 468.

(s) *Great Western Ry. Co. v. Willis* (1865) 18 C. B. N. S. 748.

on the principal's behalf at the time when he makes them (*t*), or which are not made in the ordinary course of that employment (*u*), admissible in evidence against the principal, except where the principal expressly referred the person to whom the statements are made to the agent for information in the particular matter (*v*). A report made by an agent to his principal for his information cannot be used as evidence against the principal by third persons (*w*). S. 238.

Privilege from distress of goods in hands of agent.—Where an agent carries on a trade or business in which the public are invited to entrust their goods to him for the purpose of being sold or otherwise dealt with in the course of that trade or business, goods entrusted to him for any such purpose are, while on his premises (*x*), or on other premises hired by him for any such purpose (*y*), absolutely privileged from distress for rent. The rule does not extend to agents generally, but only to those, such as factors and auctioneers, who carry on a trade or business of a public nature (*z*); nor does the privilege attach to goods which at the time of the distress are on premises neither occupied nor hired by the agent, though they may have been sent there to be dealt with in the ordinary course of his trade or business (*a*).

(*t*) *Parkins v. Hawkshaw* (1814) 2 Stark. 239; 19 R. R. 711; *Wilson v. Ryner v. Pearson* (1812) 4 Taunt. 662; 13 R. R. 723.
(*u*) *Turner* (1808) 1 Taunt. 398; 9 R. R. 797; *Petch v. Lyon* (1846) 9 Q. B. 147, 72 R. R. 205.

(*v*) *Barnett v. South London Tramways Co.* (1887) 18 Q. B. D. 815 (representation by secretary of tramway company that certain money was due from the company); *Garth v. Howard* (1832) 8 Bing. 451; 34 R. R. 753; *Meredith v. Footner* (1843) 11 M. W. 202; 63 R. R. 581.
(*x*) *Williams v. Holmes* (1853) 8 Ex. 861; 91 R. R. 802 (auctioneer); *Gilman v. Elton* (1821) 6 Moo. 243; 23 R. R. 567 (factor); *Findon v. McLaren* (1845), 6 Q. B. 891; 66 R. R. 588 (commission agent).

(*y*) *Brown v. Arundell* (1850) 10 C. B. 54; 84 R. R. 457 (room hired by auctioneer, though hired only for the purpose of a particular sale).

(*z*) *Tapling v. Weston* (1883) 1 C. & E. 99 (agent for the sale of the goods of two particular manufacturers only).

(*a*) *Lyons v. Elliott* (1870) 1 Q. B. D. 210 (goods sent by A. to be sold by auction together with B.'s goods on B.'s premises not privileged).

S. 238. **Bribery of Agent.**—The rights of the principal against an agent in respect of bribes received in the course of the agency are dealt with in the commentary to s. 216. In addition to what is said there it may be mentioned that the receipt of a bribe by an agent justifies his immediate dismissal without notice, although the contract of agency may provide for its continuance for a specified time (*b*).

As against the person promising or giving anything in the nature of a bribe to an agent, the principal may avoid any contract made or negotiated by the agent, or in the making of which the agent was in any way concerned, whether he was in fact influenced by the bribery or not, it being conclusively presumed against the briber that he was so influenced (*c*). Where A., having entered into a contract for the sale of a pair of horses to B., subject to a certificate of soundness from B.'s agent, secretly offered the agent a certain sum if the horses were sold, and the agent, having accepted the offer, certified that they were sound, it was held that B. was not bound by the contract, whether the agent was or was not influenced by the bribe (*d*). Nor is it necessary that the bribery should have any direct relation to the particular transaction. A gift made in order to influence an agent generally in favour of the giver is sufficient to render any transactions entered into by the agent voidable against the giver at the principal's option (*e*).

The principal may, if he thinks fit, affirm any contract which is voidable on the ground of bribery. In such case, and also where avoidance of the contract is impossible owing to his not having discovered the bribery soon enough, the principal is entitled to recover from the briber, as money had and received, the amount given or promised as a bribe if ascertained (*f*); or to sue him and the agent, who are liable jointly and severally, for any loss sustained by reason of having entered into the contract, the damages being ascertained without reference to any sum which may have already

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| <p>(<i>b</i>) <i>Boston Fishing Co. v. Ansell</i> (1888) 39 Ch. Div. 339.</p> <p>(<i>c</i>) <i>Shipway v. Broadwood</i> [1899] 1 Q.B. 369 (in this case the bribery was discovered in the course of an action to enforce the contract); <i>Odessa Tramways Co. v. Mendel</i> (1877) 8 Ch. Div. 235;</p> | <p><i>Bartram v. Lloyd</i> (1904) 90 L. T. 357.</p> <p>(<i>d</i>) <i>Shipway v. Broadwood</i>, above.</p> <p>(<i>e</i>) <i>Smith v. Sorby</i> (1875) 3 Q. B. D. 552, n.</p> <p>(<i>f</i>) <i>Hovenden v. Millhoff</i> (1900) 83 L. T. 41.</p> |
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been recovered from the agent as money received to the principal's use (g). S. 238.

An agent cannot maintain any action for the recovery of money promised to be given to him by way of a bribe, whether he was induced by the promise to depart from his duty to the principal or not (h). Such a promise, being founded on a corrupt consideration, cannot be enforced by law.

Right of principal to follow property into hands of third persons.—

Where the property of the principal is disposed of by an agent in a manner not expressly or ostensibly authorised (i), the principal is entitled, as against the agent and third person, subject to any enactment to the contrary (j), to recover the property, wheresoever it may be found (k).

Personal liability of agent to repay money received to principal's use.—An agent is not, as a general rule, personally liable to repay money received by him for the use of his principal, though he may not have paid it over to the principal, and the circumstances are such that the person paying the money is entitled, as against the principal, to have it repaid (l). Where a solicitor received a deposit at a sale by auction as agent for the seller, and the sale was not completed owing to the seller's default, it was held that no action could be maintained against the solicitor for the return of the deposit, even if he had not paid it over to the seller (m).

(g) *Salford (Mayor of) v. Lever* [1891] 1 Q. B. 168; *Grant v. Gold, etc., Syndicate* [1900] 1 Q. B. 233.

(h) *Harrington v. Victoria Dock Co.* (1878) 3 Q. B. D. 549.

(i) As to ostensible authority, see a. 237 and commentary.

(j) See, for instance, ss. 108 and 178, pp. 532, 652 above, as to sales and pledges by persons in possession of goods or of the documents of title thereto.

(k) *Lang v. Smyth* (1831) 7 Bing. 284; 33 R. R. 462; *Farguharson v. King* [1902] A. C. 325; *Colonial Bank v. Cady* (1890) 15 App. Cas. 267; *In re*

European Bank (1870) L. R. 5 Ch. 538.

(l) *Cary v. Webster* (1731) 1 Str. 480; *Davys v. Richardson* (1888) 21 Q. B. D. 202; *Taylor v. Metropolitan Ry. Co.* [1906] 2 K. B. 55.

(m) *Ellis v. Goulton* [1893] 1 Q. B. 350, following *Bamford v. Shuttleworth* (1840) 11 A. & E. 926; 52 R. R. 542. An auctioneer receiving a deposit is, however, personally answerable, because he is in the position of a stakeholder: *Gray v. Gutteridge* (1827) 3 C. & P. 40; 31 R. R. 343; *Edwards v. Holding* (1814) 5 Taunt. 815; 15 R. R. 662.

8. 238. But an agent is personally liable to repay money paid to him under a mistake of fact (*n*), unless he has paid it over to the principal in good faith, or dealt to his detriment with the principal in the belief that the payment was a valid one, before receiving notice of the intention of the payer to demand repayment (*o*). Merely crediting the principal in account is not sufficient to discharge the agent. There must be an actual change of circumstances to the agent's detriment in consequence of the payment (*p*). Similar principles apply where the money is paid in respect of a voidable transaction (*q*), or for a consideration which totally fails (*r*), or under duress (*s*), or in consequence of any fraud or wrong to which the agent is not a party (*t*). If the money is obtained by duress, or by means of any fraud or wrong, to which the agent is a party or privy, he is personally liable to repay it whether he has paid it to the principal or not (*u*). Payment over is no defence in the case of wrong-doers (*v*). An agent is also personally liable, notwithstanding that he may have paid the money over in good faith, if it was paid to him in regard to a contract made in his personal capacity (*w*).

CHAPTER XI.

OF PARTNERSHIP.

[The English Partnership Act of 1890 is sometimes referred to in the commentary by the abbreviation P. A.]

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- (*n*) *Newall v. Tomlinson* (1871) L.R. 6 C. P. 405; *Buller v. Harrison* (1777) Cowp. 565.
 (*o*) *Holland v. Russell* (1863) 4 B. & S. 14; 129 R. R. 635; *Shand v. Grant* (1863) 15 C. B. N. S. 324.
 (*p*) *Buller v. Harrison*, above; *Cox v. Prentice* (1815) 3 M. & S. 344; 16 R. R. 288.
 (*q*) *Holland v. Russell*, note (*o*) above.
 (*r*) *Ex parte Bird* (1851) 4 De G. & S. 273.
 (*s*) *Owen v. Cronk* [1895] 1 Q. B. 265.
 (*t*) *East India Co. v. Tritton* (1824) 5 D. & R. 214; 27 R. R. 353.
 (*u*) *Oates v. Hudson* (1851) 6 Ex. 346; 86 R. R. 326; *Wakefield v. Newbon* (1844) 6 Q. B. 276; 66 R. R. 379; *Padget v. Priest* (1787) 2 T.R. 97; 1 R. R. 440.
 (*v*) *Sharland v. Milton* (1846) 5 Hare, 469; 71 R. R. 180; *Ex parte Edwards* (1884) 13 Q. B. D. 747.
 (*w*) *Gurney v. Womersley* (1854) 4 E. & B. 133; 99 R.R. 390; *Newall v. Tomlinson* (1871) L. R. 6 C. P. 405. As to when an agent is to be considered as contracting personally, see commentary to s. 230, ante, p. 738.

Our modern law of partnership was built up, in the course of less than a century, by judicial decisions to which legislation added next to nothing; and the great majority of those decisions were in Courts of Equity. The Commission which framed the original draft of the Contract Act included Lord Romilly, for many years Master of the Rolls, and Sir William James, Vice-Chancellor, and afterwards Lord Justice, who was second only to Jessel among modern equity lawyers. Hence the chapter on Partnership is perhaps the best in the Act. Comparison with the English Act of 1890, reprinted below in the Appendix for reference, will show that it was of great use to the English draftsman of the digest which ultimately became the groundwork of that Act. For English purposes, however, it was necessary to go more fully into details, and the Partnership Act contains nearly twice as many sections as the present chapter (x). It is possible that the Indian Law Commissioners might have done better if they had been less brief; but they did very well, and almost the only thing to be regretted about this part of their work is that they were so sparing of illustrations, which in this subject would have been particularly appropriate.

See.
238, 239.

Lord Lindley's statements of English judicial practice are sometimes cited without further reference to authority. For all purposes, except that of being technically binding on the Court (which English decisions themselves are not in British India), they carry at least as much weight as most reported judgments.

239.—"Partnership" is the relation which subsists between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them.

"Partnership" defined. Persons who have entered into partnership with one another are called collectively a "firm."

Illustrations.

(a) A. and B. buy 100 bales of cotton, which they agree to sell for their joint account. A. and B. are partners in respect of such cotton.

(x) For the history of the English law's Digest of the Law of Partnership, codification, see the Preface to Pol-

S. 239.

(b) A. and B. buy 100 hales of cotton, agreeing to share it between them. A. and B. are not partners.

(c) A. agrees with B., a goldsmith, to buy and furnish gold to B., to be worked up by him and sold, and that they shall share in the resulting profit or loss. A. and B. are partners.

(d) A. and B. agree to work together as carpenters, but that A. shall receive all profits and shall pay wages to B. A. and B. are not partners.

(e) A. and B. are joint owners of a ship. This circumstance does not make them partners.

Definition and essentials of partnership.—A large number of definitions of partnership will be found collected in the first chapter of Lord Lindley's standard treatise. The first paragraph of the present section is a simplified form of Kent's definition (y), which was adopted by Story. The definition which stands in the English Act, "The relation which subsists between persons carrying on a business in common with a view of profit," is novel; it appears to be founded on the following dictum of the Judicial Committee in an Indian case decided on the analogy of English law:—"To constitute a partnership the parties must have agreed to carry on business and to share profits in some way in common" (z). It will be observed that the definition in the Partnership Act does not mention sharing as distinguished from making profits; and perhaps it is now arguable that in England persons may be partners in an undertaking carried on by them in concert without aiming at personal gain, or even on the express terms that none of them shall derive any individual profit from it. Indeed, it is maintained that this was always so, and that the object of dividing profits, though almost always important in fact, "appears to be rather an accident than of the essence of the partnership relation" (a). It is clear that this opinion did not occur to Kent, or Story, or the framers of the Contract Act, or Sir George Jessel, who said that partnership is at all events a contract for the purpose of carrying on a business bringing profit;

(y) "Partnership is a contract of two or more competent persons to place their money, effects, labour, and skill, or some or all of them, in lawful commerce or business and to divide the profit and bear the loss in certain pro-

portions": Kent, Comm. iii. 23.

(z) *Mollwo, March & Co. v. Court of Wards* (1872) L.R. 4 P. C. 419, 436; 10 B. L. R. 312, 320, on appeal from (1869) 3 B. L. R. A. C. 233.

(a) Lindley, p. 10.

and dividing the profit in some shape or other between the partners (b). However, if any difficulties arise from the new English definition they must be solved by English Courts (c). Under the present section there can be no doubt that agreement to share profits is essential to the constitution of a partnership. S. 239.

Kent's definition was criticised by Sir George Jessel in the judgment just now cited (b) on the ground that there may be a dormant partner, such as the widow of a former partner succeeding to his share by virtue of a provision in the articles, who contributes nothing. But, with great respect, there is no such word as "contribute" either in Kent or in the Contract Act. A dormant partner's share is no less his property because it is acquired by gift, or in pursuance of a contract to which he was not a party; and he does combine his share with those of the other partners, whether he can be properly said to contribute it or not.

Co-ownership and partnership.—There is not partnership without combination to carry on a business, and therefore the mere fact that persons own in common something which produces returns, and divide those returns according to their respective interests, does not make them partners. "Persons who have no mutual rights and obligations do not constitute an association because they happen to have a common interest or several interests in something which is to be divided between them" (d). No one ever suggested that co-owners of a house let to a paying tenant, for example, are partners either as to the house or as to the rent. Their shares are distinct, independent, and separately alienable. If they used the house as an hotel managed by themselves or their agent for their common profit, they would be partners in the business of hotel-keeping (e). Property may even be acquired in common in order

(b) *Pooley v. Driver* (1876) 5 Ch. D. 458, 472, 473.

(c) We should submit, if it were relevant here, that a committee managing the affairs of a society or the like without a view to individual gain may in particular cases incur liabilities resembling those of partners by "holding out" or by actual agency, but there is no presumption of authority to pledge

their common credit, and it must be a question of fact in every case to whom credit was given.

(d) James, L.J., in *Smith v. Anderson* (1880) 15 Ch. Div. at p. 275.

(e) This needs no authority, but *French v. Styling* (1857) 2 C. B. N. S. 357; 109 R. R. 716; may be referred to; see per Willes, J., 2 C. B. N. S. at p. 336; 109 R. R. 722.

S. 239. to make profit of it without creating a partnership. If A., B., and C. agree to buy land on joint account, and for interests proportioned to their contributions, and to form a company to take it over and use it for profit, this will not make them partners; A., B., and C. have distinct shares in the property, uncontrolled except by the specific agreement, and if the company is formed and buys the land, each of them will be separately entitled to the price of his share (*f*). If they had started the proposed business on the land on their own account instead of selling to the company, they would have been partners, though the land would be partnership property only if they originally acquired it for the purpose of the joint business, or expressly agreed to bring it into the partnership stock (s. 253, sub-s. 1, pp. 808-810 below).

As to ships in particular, it has long been settled that part owners of a ship are not necessarily partners (*g*); but if they employ the ship in trade or adventure on their joint account, they are partners as to that employment and the profit thereby made (*h*).

Where persons enter into an agreement constituting a partnership limited to a joint trading adventure, and goods are purchased, ostensibly by an individual adventurer but really for the purpose of the joint adventure, the adventurers are liable as partners; but there is no such responsibility for goods purchased before the partnership agreement upon the credit of an individual adventurer, though they are afterwards brought into stock as his contribution to the joint adventure (*i*).

Since the fact that several persons are co-owners of a ship does not make them partners (Illustration (e)), a suit by one co-owner against another for his share of the sale proceeds of the ship and the profits earned by the ship before sale is not such a winding up suit as is contemplated by s. 265 (p. 829 below) (*j*). But "cases may sometimes occur in which a partnership exists between persons owning a ship, and the ship may be part of the assets of the firm;

(*f*) *London Financial Association v. Gada Pallamraju* (1918) 41 Mad. 939.

Kell (1884) 26 Ch. D. 107, 143.

(*g*) *Karmali v. Vora Karimji* (1915)

(*g*) *Helme v. Smith* (1831) 7 Bing.

L. R. 42 I. A. 48, 39 Bom. 261.

709, 713; 33 R. R. 630, 633.

(*j*) *Hyder Ali v. Elahjee Buz* (1882)

(*h*) *Green v. Briggs* (1847) 6 Ha. 395; *Vanamati Sattiraju v. Hollapra-*

but in such a case some contract of partnership exists between the parties, or some joint business is carried on by them to which owning of ships is merely accessory" (k). S. 239.

Profits.—The profits contemplated by the Act, and by the common law of partnership, sometimes called "net profits," "are the excess of returns over advances, the excess of what is obtained over the cost of obtaining it." It was formerly common to speak of the total receipts or gross returns of a business as "gross profits." This is objectionable, and should be avoided (l). Obviously there may be very large gross returns and yet little or no real profit. Sharing gross returns will not create a partnership, as the English Act (s. 2, sub-s. 2), in affirmance of the general law, has expressly declared. The owner of a theatre lets a travelling manager and his company use the building, scenery, appliances, and permanent staff, in consideration of receiving half the money taken from spectators. This does not make the owner answerable as partner or principal for anything done by the manager which may be the subject of suits or penalties, such as infringement of dramatic copyright (m). Similarly the author of a book receiving a royalty on copies sold is not a partner with the publisher; and it seems that he is not so even if the agreement is to divide profits, the publisher taking all risk (n).

Sharing profits.—As common interest will not make a partnership without division of profits, so sharing of profits will not unless there is really a common business. The following sections, from 240 to 244, are only some special applications of this principle. Sharing the profits of an undertaking is not of itself a partnership, though the existence of partnership may often be inferred from it. "It is said (and about that there is no doubt) that the mere participation in profits *inter se* affords cogent evidence of partnership. But it is now settled by the cases of *Cox v.*

(k) *Ib.*, p. 1013.

(l) Lindley, 41.

(m) *Lyon v. Knowles* (1863) 3 B. & S. 556; 5 B. & S. 751; 129 R.R. 452, 458.

(n) Lindley, 53; Pollock, 18; and see per Lord Brougham and Lord Wensleydale in *Cox v. Hickman* (1860) 8 H. L. C. at p. 277; 125 R. R. at p.

153. No one acquainted with literary business can suppose that in fact the printer, binder, etc., give credit to any one but the publisher. The relations between authors and publishers or editors really form a distinct species of contract, about which there is less authority than might be expected.

239. *Hickman (o)*, *Bullen v. Sharp (p)*, and *Mollwo, March & Co. v. Court of Wards (q)*, that although a right to participate in profits is a strong test of partnership, and there may be cases where upon a simple participation in profits there is a presumption, not of law, but of fact, that there is a partnership, yet whether the relation of partnership does or does not exist must depend upon the whole contract between the parties, and that circumstance is not conclusive" (r). Before the decision of the House of Lords in *Cox v. Hickman (s)* it was supposed that every one who took a share in the profits of a business was liable as a partner to outside creditors, whatever might be the terms as between himself and the persons actually conducting the business. But the true test is not whether a man receives a share of profits; it is whether the business is being carried on by him, or by another on his account, so that he is a principal. Creditors who supervise the conduct of their debtor's trade, with an agreement to pay themselves off out of the profits, do not thereby become his partners (s); and the same principle applies to trustees for debenture-holders. A receiver whom they have appointed under their powers is not their servant, and does not become so, or make them liable for his contracts, even after he has ceased, by the winding up of the company, to be the company's agent (t). The question is really one of agency and authority (u).

In the leading case in the Privy Council, where it was first clearly laid down that the question whether the relation of partnership does or does not exist, "must depend on the real intention and contract of the parties" (v), there was a contract between a

(o) (1860) 8 H. L. C. 268 ; 125 R. of his debt, were given to a single creditor.
R. 148.

(p) (1865) L. R. 1 C. P. 86, Ex. Ch.

(q) L. R. 4 P. C. 419.

(r) Jessel, M.R., *Ross v. Parkyns* (1875) L. R. 20 Eq. 331, 335, closely following the language of the Judicial Committee in *Mollwo, March & Co.'s* case.

(s) Note (o), above. *Mollwo, March & Co. v. Court of Wards* was essentially a similar case, in which powers of control and retaining profits, or a percentage of them, towards payment

(t) *Gosling v. Gaskell* [1897] A. C. 575. It would seem that after that date the receiver was personally liable on contracts made by him, as having no principal who could be sued.

(u) See the comments on *Cox v. Hickman* in *Bullen v. Sharp*, notes (o) and (p), above.

(v) *Mollwo, March & Co. v. Court of Wards* (1872) L. R. 4 P. C. 419 ; 10 R. L. R. 312, 320, on appeal from 3 B. L. R. A. C. 238 ; supp. vol. I. A. 86.

partnership firm and a third person whereby it was agreed that he should receive in consideration of advances a commission on the net profits of the partnership business, and large powers of control over the business were given to him for his protection, but no power to direct transactions. This was decided to be a contract not of partnership, but of loan and security between a debtor and a creditor (*w*). The same principle is applied to other kinds of transactions. An agreement by A. to pay Z., in consideration of his guaranteeing A., in underwriting business, a certain proportion of A.'s profits in that business, does not make Z. a partner with A. (*x*). Again, if a deceased partner's executors are entitled by the articles to receive his share of profits during the rest of the partnership term if he dies before its expiration, they are not thereby made partners (*y*). It must be remembered that in all cases the result depends on the real contracts and intention of the parties as shown by all the facts. It is settled or highly probable that certain kinds of facts are not alone sufficient to constitute partnership. The question how much must be added to produce that result is not capable of any general answer, save that modern Courts may be expected, on the whole, to treat men as partners when and so far as a sensible man of business would consider them so.

In an ordinary club the committee has no authority to pledge the credit of the members at large, and the members are not liable for debts incurred by the committee. As in such a case no single element of the contract of partnership is present, it is rather hard to see how the members can ever have been supposed to be liable as partners; but it was once thought arguable, and even said to be the common opinion (*z*).

Partnership and service.—Sometimes it is not easy to draw the line between a partnership and a payment of salary by a share of profits. The owner of a ship, who has been paying the master fixed wages, hands over the management of the ship to the master on the terms of receiving a fixed share of profits from him. Does this leave the master the owner's servant, though a servant with large discretion,

(*w*) *Ib.*

7 Ex. 218.

(*x*) *Ex parte Tennant* (1877) 6 Ch. Div. 303.

(*z*) *Fleming v. Hecor* (1836) 2 M. & W. 172; 46 R. R. 563.

(*y*) *Holme v. Hammond* (1872) L.R.

- S. 239. or make him a partner with the owner in the adventure? Probably the latter, but either opinion is plausible (a).

It is even possible for Z. both to receive a share of the profits of A.'s business and bear a share of losses, and yet, by the special terms of their agreement, to be in the position of a servant as regards A., and not entitled to the remedies of a partner (b). We do not know of any decision that a person in such a position was not liable as a partner to creditors of the business.

The firm.—By the current usage of affairs, a firm is distinct from its members. They may have claims on the firm's property, but it is not theirs. It has separate accounts, and is their debtor and creditor. Quite possibly some person who is not a member of the firm may have authority to do certain things in its name which some or one of the partners have not. In short, the firm is treated very much as if it were a corporation; it is an artificial or "moral" person for business purposes; and in some systems of law this personality receives formal acknowledgment. "In Scotland," in particular, "a firm is a legal person distinct from the partners of whom it is composed" (c), though the individual partners may be liable for its debts. But the Common Law has no means of admitting any kind of legal existence between that of a formally constituted corporation and that of an individual human being (though the procedure of Courts of Equity can go near it in what are called representative suits); and for English jurisprudence the firm is only a compendious name for certain persons who carry on business, or have authorised one or more of their number to carry it on, in such a way that they are jointly entitled to the profits and jointly liable for the debts and losses of the undertaking. For the purpose of determining legal rights "there is no such thing as a firm known to the law" (d). It is true that under the Code of Civil Procedure 1908, O. XXX., as under the English Rules of Court (now O. XLVIII.), and, we are informed, by statute in many other jurisdictions, actions may be brought by and against partners in the name

(a) *Steel v. Lester* (1877) 3 C. P. D. 121, per Lindley, J., at pp. 127, 128.

All that had to be decided was that, one way or another, the owner remained liable for the master's negligence.

(b) *Walker v. Hirsch* (1884) 27 Ch. Div. 460.

(c) Partnership Act, s. 4, sub-s. 2.

(d) *James, L.J., Ex parte Corbett* (1880) 14 Ch. Div. 122, 126.

of the firm, and even between firms and their members; but this is only a matter of procedure. Partnership property, again, is recognised in more than one way, but only as that which is "joint estate" of all the partners as distinguished from the "separate estate" of any of them, not as belonging to a body distinct in law from its members. S. 239.

Under our normal law (*e*) there are no prescribed forms for the style of a firm, and the liberty of partners to assume any firm-name they please is bounded only by the general rules as to good will (p. 808, below) and trade names (*f*). A firm-name may be personal or impersonal, singular or plural, and need not contain the name of any existing partner. The style of one well-known book-selling house in London consists simply of the name of the original founder, long since dead. "X. & Co.," "X., Y., & Z.," "The X. Co.," "X. & Son," "X.'s Sons" (common in America). "X. Brothers" and other varieties, are alike usual and allowed. Also there is no general rule to prevent a sole continuing member of the firm of X. & Co., from continuing to trade as X. & Co., nor indeed to prevent X. or Z., who has never had a partner, from trading under the style of X. & Co., provided that he is not thereby doing wrong to an existing X. & Co. Most commercial countries not under the Common Law have precise regulations in these matters.

The principle of the Common Law, on the other hand, is to allow great latitude in the use of personal names so long as they are not assumed or changed for purposes of deception. "Individuals may carry on business under any name and style they may choose to adopt" (*g*), provided they do not adopt a name tending to mislead the public into confusing them with others already trading under the same or like names. It is not true, on the other hand, that a man has a positive and universal right to employ his usual name. As a rule the mere fact that a rival's name resembles his own is no

(*e*) The Registration of Business Names Act, 1916, extends only to the United Kingdom and does not limit the choice of names. (p. 130, above). This could hardly apply to a firm.

(*g*) *Eric, C.J., Maughan v. Sharpe* (1864) 17 C. B. N. S. at p. 492; *Levy*

(*f*) In rare cases the concealment of one's usual name may be fraudulent *v. Walker* (1879) 10 Ch. Div. 436, 445.

- §. 239. reason for restraining him from dealing in the name he has always borne. The Court will not interfere merely because the similarity may be an occasion for careless people to make mistakes. Lord Justice Knight Bruce said in a celebrated judgment: "All the Queen's subjects have a right, if they will, to manufacture and sell pickles and sauces, and not the less that their fathers have done so before them. All the Queen's subjects have a right to sell these articles in their own names, and not the less so that they bear the same name as their fathers" (*h*). A man has no monopoly in his name; the question of substance is always whether the defendant is trying to pass off his wares as the wares of another, and this must be decided according to the evidence in each case. Where fraudulent intention is shown, on the other hand, it is not a sufficient answer for the defendant to say that the name he is using in business is the name he has adopted for all purposes; freedom of choice does not extend to choosing just that name which will enable one to appropriate the reputation of another man's goods (*i*). The same reasons apply to the use of corporate names (*j*) and firm names (*k*), and also to the use of distinctive trade names for goods (not to be confused with registered trade marks); in this last case a name which, taken alone, is a literally true description of the goods sold under it may be rendered fraudulent by the manner and circumstances of its use (*l*). "A statement which is literally true, but which is intended to convey a false impression, has something of a faulty ring about it; it is not sterling coin; it has no right to the genuine stamp and impress of truth" (*m*). Even a true name, personal or other, is not a commodity to be sold and trafficked in without regard to the use that may be made of it (*n*).

(*h*) *Burgess v. Burgess* (1853) 3 D. M. & G. 896, 903; see also the judgment of Turner, L.J., at p. 905 (98 R. K. 350, 354, 355).

(*i*) *Pinet & Cie. v. Maison Louis Pinet* [1898] 1 Ch. 179.

(*j*) *Saunders v. Sun Life Assurance Co. of Canada* [1894] 1 Ch. 537.

(*k*) *Turton v. Turton* (1889) 42 Ch. Div. 128, really a very plain case, see

per Lord Macnaghten [1896] A. C. at p. 220.

(*l*) *Montgomery v. Thompson* [1891] A. C. 217; *Reddaway v. Banham* [1896] A. C. 199.

(*m*) Lord Macnaghten [1896] A. C. at p. 219.

(*n*) *Fine Cotton Spinners', etc., Association v. Harwood, Cash & Co.* [1907] 2 Ch. 184.

It will be remembered that the number of persons who may form an ordinary partnership is limited both in England and in India by the Companies Act (sec s. 266, p. 835, below). These provisions supersede the question, speculative and antiquarian even in England, whether it is an offence to assume to act as a corporation (o).

Joint Hindu family firm.—The case of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family must be distinguished from that of an ordinary partnership arising out of contract. The rights and liabilities of the coparceners in the former case cannot be determined by exclusive reference to this Act, but must be considered also with regard to the general rules of Hindu law which regulate the transactions of united families. According to those rules, the death of one of the coparceners does not dissolve the family partnership; nor, as a rule, can one of the coparceners, when severing his connection with the business, ask for an account of past profits and losses (p). Further, the managing member of the family can pledge the credit or property of the family for the ordinary purposes of that business (q); but the other coparceners are liable to the extent of their interest in the family property only, unless the contract relied on, though purporting to have been entered into by the manager only, is in reality one to which the other coparceners are actual contracting parties or one which they have subsequently ratified (r). And though a trade, like other property, is descendible amongst Hindus, it does not follow that a Hindu infant, who by birth or inheritance becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading firm, so as to require him to join as a plaintiff in suits on dealings and transactions with the adult members of the family carrying on the family

(o) See Pollock, Digest of Partnership, 26, 27.

(p) *Sāmalbhūti v. Someshtar* (1880) 5 Bom. 38.

(q) *Bemola v. Mohun* (1880) 5 Cal. 792; *Ramlal Thakursidas v. Dukkmi-chand Muniram* (1861) 1 B. H. C. app. li. There is no such implied power to pledge family property for embark-

ing on an entirely new business: *Morrison v. Verschoyte* (1901) 6 C. W. N. 429.

(r) *Chalamayya v. Varadayya* (1898) 22 Mad. 166; *Bishambhar Nath v. Sheo-Narain* (1906) 29 All. 166; *Bishambhar Nath v. Fateh Lal* (1906) 29 All. 170; *Sāmalbhūti v. Someshtar* (1880) 5 Bom. 38.

Ss. 9, 240. business (s). In the case, however, of a partnership composed of certain individual members of a joint Hindu family and others who are strangers to the family, the relations of the parties are governed by the provisions of this Act, and not by any rules governing a joint Hindu family (t).

240.—A loan to a person engaged or about to engage in any trade or undertaking, upon a contract with such person that the lender shall receive interest at a rate varying with the profits, or that he shall receive a share of the profits, does not, of itself, constitute the lender a partner, or render him responsible as such.

Sections 240 to 244 superseded a special Act XV of 1866, which reproduced, with one addition (now s. 241) (u), the provisions of the English Act 28 & 29 Vict., c. 86, often called Bovill's Act. This Act was superseded and repealed by s. 2, sub-s. 3, of the Partnership Act, 1890. It was the somewhat illogical result of the desire expressed by a considerable number of business men for the introduction of the system of "commandite" partnership which has long been familiar on the Continent of Europe. That is a system of true limited partnership in which one or more active members are liable without limit as ordinary partners, but the others are liable only to the extent of the capital they respectively contribute or undertake to contribute. Later it was supposed that the facility of forming limited companies had made limited partnership unnecessary; but the demand was renewed (Bovill's Act being satisfactory neither in substance nor in form), and a Limited Partnerships Act (7 Ed. 7, c. 24) was passed in 1907. There is not much to be said about its operation. The "private companies" recognised by the Companies (Consolidation) Act, 1908, s. 121, are found in practice more useful; but this does not concern us here.

(s) *Lutchmanan v. Siva Prokasa* (1899) 26 Cal. 349; *Vadilal Lalubhai v. Shah Khushal Dripatram* (1903) 27 Bom. 157; Official Assignee of Madras v. *Palaniappa Chetty* (1908) 41 Mad. 824.
(t) See *Anant Ram v. Channu Lal*

(1903) 25 All. 378.

(u) This does not answer to anything in the English Act; the note in Whitley Stokes' Anglo-Indian Codes, i. 648, is therefore not quite accurate.

It is now well understood, though at the time it was not, that these enactments really added nothing in principle to the law settled by the decision of the House of Lords in *Cox v. Hickman* (p. 778 above). Since that decision, apart from any legislation, "it is no longer right to infer either partnership or agency from the mere fact that one person shares the profits of another" (v). That fact is relevant, but not decisive, and not to be taken by itself as if it raised a special presumption and laid the burden of proof on the party denying a partnership. All the facts must be considered together (v).

The mere fact that parties call themselves partners in a writing embodying the agreement between them does not constitute "partnership" within the meaning of s. 239, if the true relation be that of creditor and debtor (w). On the other hand, an agreement which purports to be by way of loan and security may be in reality one of partnership, and will be given effect to as such; "for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character" (x).

This principle was applied in an English case where the agreement with the so-called lender gave him many of the powers of a partner, and the loan was not repayable till the expiration of the partnership admitted to exist between the debtors. The lender was held to be liable as a partner for their debts (y). The same result followed where, in addition to similar incidents, the capital of the business consisted wholly of the sum described as a loan (z).

241.—In the absence of any contract to the contrary, property left by a retiring partner, or the representative of a deceased partner, to be used in the business is to be considered a loan within the meaning of the last preceding section.

(v) *Badeley v. Consolidated Bank* (1888) 38 Ch. Div. 238, per Lindley, L.J., at p. 258, per Cotton, L.J., at p. 250; *Porter v. Ince* (1905) 10 C. W. N. 313.

(w) See *Bhaggu Lal v. Le Gruyther* (1881) 4 All. 74.

(x) *Molluo, March & Co. v. Court of Wards* (1672) 10 B. L. R. 312, 323.

(y) *Pooley v. Driver* (1876) 5 Ch. D. 453.

(z) *Ex parte Delhasse* (1878) 7 Ch. Div. 511.

Ss.
241-244. There is nothing verbally resembling this section in the repealed English "Act to amend the law of partnership" of 1865, nor has it been adopted in the Partnership Act, 1890; but under that Act the case is covered by the general words of s. 2, sub-s. 3, which only declare the effect of *Cox v. Hickman* (p. 778, above). In a good many cases under this section the facts would also fall under s. 243.

242.—No contract for the remuneration of a servant or agent of any person, engaged in any trade or undertaking, by a share of the profits of such trade or undertaking shall, of itself, render such servant or agent responsible as a partner therein, nor give him the rights of a partner.

Servant or agent
remunerated by
share of profits not
a partner.

An agreement to give the gomasta of a firm a specified share of profits in lieu of salary does not constitute him a partner; and such was the practice and understanding before the Act (a). The principle has been explained, and English authorities referred to, under s. 239.

243.—No person, being a widow or child of a deceased partner of a trader, and receiving, by way of annuity, a proportion of the profits made by such trader in his business, shall, by reason only of such receipt, be deemed to be a partner of such trader, or be subject to any liabilities incurred by him.

Widow or child of
deceased partner
receiving annuity
out of profits not a
partner.

244.—No person receiving, by way of annuity or otherwise, a portion of the profits of any business, in consideration of the sale by him of the goodwill of such business, shall, by reason only of such receipt, be deemed to be a partner of the person carrying on such business, or be subject to his liabilities.

Person receiving
portion of profits
for sale of good
will not a partner.

There do not seem to be any reported Indian decisions on this or the preceding section. We have nothing to add to the general explanation in the commentary on s. 239.

(a) *Ramdoyal v. Junmenjoy* (1987) 14 Cal. 791 (no dispute on this point.)

245.—A person who has, by words spoken or written or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as partner in such firm.

Responsibility of person leading another to believe him a partner. S. 245.

"Holding out."—This is the rule of liability by "holding out," more fully stated in s. 14 of the English Act. The present section omits to say that the other party must in fact have given credit to the firm in the belief, induced by the express or tacit representation of the supposed partner, that he is a member of the firm. But the omission, if inelegant, is harmless, for without such facts there is no ground for holding any one responsible. Any representation of this kind "can only conclude the defendants with respect to those who have altered their condition on the faith of its being true" (b). In fact, this kind of liability is neither more nor less than a special application of the principle of estoppel (c). The language of the following section is more explicit.

As long ago as 1829 the rule was laid down incidentally by a great master of our law. Parke, J., said that if in the case then before the Court "it could have been proved that the defendant had held himself out to be a partner, not 'to the world'—for that is a loose expression—but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff, arising from his conduct, as much as if he had stated to him directly

(b) *Quarman v. Burnett* (1840) 6 M. & W. at p. 509; 55 R.R. at p. 725, per Parke, B.

(c) Evidence Act 1 of 1872, s. 115: "When one person has by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his

representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." And see *Sarat Chandra Dey v. Gopal Chandra Laha* (1892) 20 Cal. 204; L. R. 19 Ind. Ap. 203, which is the leading case on the subject.

- B. 245. and in express terms that he was a partner, and the plaintiff had acted upon that statement" (d).

Nearly half a century later the doctrine was more concisely stated in the course of the judgment delivered in a leading case before the Judicial Committee which we have already cited on s. 239:—

"Where a man holds himself out as a partner, or allows others to do it...he is then properly estopped from denying the character he has assumed, and upon the faith of which creditors may be presumed to have acted. A man so acting may be rightly held liable as a partner by estoppel." (e).

"No evidence of intention or knowledge of the consequences of his acts and conduct is necessary to make the apparent parties liable" (f).

Proof of "holding out."—Observe that under this section, with which the extract just given appears to agree, the creditor need not prove specifically that he gave credit to the firm on the faith of a certain person being a partner in it. Giving credit to a firm is the same thing as giving credit to all and each of the persons believed by the creditor to be its members. In England neither judicial authority nor legislation (g) seems to go quite so far. It is a question of fact in each case whether credit was given on the faith of the representation. But, when the representation and the creditor's knowledge of it are proved, the remaining inference is so easily drawn that the results will almost always be the same. As the liability depends on estoppel and not on any contract between the apparent partners, it is immaterial what the agreement between them, if any, may really be.

An estoppel of this kind (or of any kind) cannot result from the mere unauthorised act of a third person, such as the exhibition by a secretary of a list of intending shareholders. "The holding one's self out to the world as a partner, as contradistinguished from the actual relation of partnership, imports at least the voluntary act

(d) *Dickinson v. Walpy*, 10 B. & C. 128, 140; 34 R. R. 348 355. (f) *Porter v. Incell* (1905) 10 C. W. N. 313, 320.

(e) *Mollwo, March & Co. v. Court of Wards*, L. R. 4 F. C. at p. 435. (g) Partnership Act, s. 14.

of the party so holding himself out. It implies the lending of his name to the partnership, and is altogether incompatible with the want of knowledge that his name has been so used" (h). On the other hand, there need not be any direct communication between the creditor and the apparent partner, and the latter need not be mentioned by name if he is sufficiently identified by description as one of the parties interested, or the like (i). Ss.
245, 246.

It will not be overlooked that facts capable of being used to establish a case of liability under this or the next following section will often be relevant to show that a partnership really did exist; and, as the Evidence Act declares (j), when persons are shown to have acted as partners, the burden of proof is on those who say they were not partners. This is not estoppel, but a matter of common-sense inference.

The estates of insolvent persons who were ostensible partners may have to be administered in bankruptcy as if they had been real partners (k).

246.—Any one consenting to allow himself to be represented as a partner is liable, as such, to third persons who, on the faith thereof, give credit to the partnership.

Liability of person permitting himself to be represented as a partner.

Holding out by acquiescence.—This would seem on principle to be a particular case of leading another person to believe that one is a partner; but the liability is declared in different terms from those used in the foregoing section, and apparently with the intention of making a presumption in favour of the creditor in one case and not in the other (see on s. 245 above). There is nothing to show how much more than passive assent is signified by the "consenting" of this section; and the same remark applies to the corresponding words "knowingly suffers" of the English Act, s. 14. It can hardly be the law that, if A. hears a report that Z. is representing him as a partner in X. & Co., he becomes bound at his peril to notify to the

(h) *For v. Clifton* (1830) 6 Bing. 176, 794; 31 R. R. 536, 545. (j) I. of 1872, s. 109.
 (k) *Ex parte Hayman* (1878) 8 Ch. Div. 11.
 (i) *Martyn v. Gray* (1863) 14 C. B. N. S. 824; 135 R. R. 905.

- S. 246. world that he is not. But there is an amount of silence, in the face of known persistent representations made to persons likely to be misled, which may be good evidence of consent. All that can be said in general terms is that prudent men will rather use a little abundant caution in due season than run the risk of much more trouble at a later time.

In practice questions of this kind are suggested mainly by the case of a deceased or retired member's name being continued in the firm. Since our law does not in any way require the style of a firm to correspond with the names of actual partners (p. 781 above), the presence of a given name is of itself no representation that any person bearing that name is in fact a partner. It is accordingly well settled that the continuance of a deceased partner's name will not make his estate liable for partnership debts contracted after his death (l). But a living retired partner may be exposed to risk in this way, that customers of the firm who have no notice of his retirement by a change of style or otherwise may go on dealing with the firm on the faith of his being a member (see s. 264, p. 827, below, and s. 36 of the English Act). Therefore it is prudent and usual to notify customers of changes in the constitution of the firm. No creditor, however, can hold a retired partner liable whom he did not know to be a partner before the change in the firm, and who had ceased to be a partner in fact when the credit was given. Thus a "dormant partner," *i.e.*, one not generally known to be such, "may retire from a firm without giving notice to the world" (m).

Strictly speaking, it seems that in the case of a retiring partner the representation that he is still a member of the firm is not made by others and consented to by him, but is his own; for, much oftener than not, credit given on the faith of his being a partner is so given not because the other partners say anything, but because he has said nothing. Indeed, the presence of a particular name in the firm has very little to do with the matter, save so far as the disappearance of a personal name may be a warning that some member of that name has died or retired. A retired member of a firm with an impersonal name might be liable to a customer who had

(l) See Partnership Act, 1890, ss. 14 (2), 36 (3).

(m) *Heath v. Sansom* (1832) 4 B. & Ad. 172, 177; 38 R. R. 237, 242.

known him to be a member (n). The Contract Act and the English Act are equally open to whatever criticism may be justly founded on the foregoing remarks; but it seems a matter of form rather than of substance.

8s.
246, 247.

Not applicable to torts.—The doctrine of “holding out” does not apply to liability for civil wrongs, as it rests entirely on credit having been given to the person whom it is sought to make liable. One man is not answerable for another’s wrongful acts merely because that other might be supposed to be his servant. Ostensible employment, if one may use the term, is material only so far as it tends to prove real employment (o).

Estoppel distinct in kind from actual authority.—It is of some importance to observe that the liability of a former partner to creditors who have not notice of his retirement rests wholly upon the apparent continuing authority of the other partners to bind him by their acts. The principle is “that where a person has given authority to another (it is not peculiar to partnership), the authority being such as would apparently continue, he is bound to those who act upon the faith of that authority, though he has revoked it, unless he has given the proper notice of the revocation” (p). Hence the liability, being by estoppel, is quite different from that of the actual partners, and the ex-partner is not a joint debtor with them. The creditor may be entitled to sue at his choice the members of the old or the members of the new firm. He cannot sue them all together (q).

247.—A person who is under the age of majority according to the law to which he is subject

Minor partner
not personally lia-
ble, but his share is.

may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm; but the share of such minor in the property of the firm is liable for the obligations of the firm.

(n) See *Carter v. Whalley* (1830) 1 B. & Ad. 11; 35 R.R. 199, where the firm was “the Plas Madoc Colliery Co.” Proof of “holding out” is, no doubt, less easy in such a case; and in this case it failed.

(o) *Smith v. Bailey* [1891] 2 Q. B. 403.

(p) [Lord Blackburn, *Scurf v. Jardine* (1882) 7 App. Ca. 345, 356.

(q) *Ib.*

S. 247. English law different as to minor partners.—This section looks very much as if the draftsman, either forgetting s. 11, or taking that view of it which is now overruled by the Judicial Committee, but which was certainly plausible, had aimed at expressing the substance of English law. By the common law an infant may be a partner, though he cannot be sued for partnership debts while an infant, and the obligations contracted by him in the partnership, like any other contracts of an infant, are voidable at his election on attaining full age (*r*), and he cannot claim to share profits without submitting to a profit and loss account like any other partner, still less claim a return of, or in respect of, his share before there is a divisible surplus (which seems to be what the last clause of the present section indicates). But we know from s. 11, as now understood, that in British India a minor cannot make any contract at all, and therefore cannot really be a partner. He “may be admitted to the benefits of partnership,” but can he sue the other partners for an account or otherwise, and, if so, on what ground? Not on a contract, at all events.

Creditors, on the other hand, are more favoured by the next following section than under English law.

It is perhaps not a very apt use of language to speak of a partner's share as being liable when it is meant that his claims on the partnership funds are subject to prior claims, and that in certain events there may be no share at all. A partner's share, like that of a shareholder in a company, who is in fact a special kind of partner, is not a piece of tangible property or a specific fund. It is a mere personal right to claim a certain proportion of the divisible income, and ultimately to reclaim a certain proportion of capital, at the proper times, if and whenever it is found that there is any profit to divide and any surplus assets to distribute. This, however, is one of the matters in which inaccurate usage has been very common, and perhaps it is past criticism. The legal title or interest in partnership property will, as a rule, be found to be in the partners jointly; but that is quite another matter.

Hindu minor's ancestral trade.—There is no difference in principle between the nature of the liability of an infant admitted by agreement

(*r*) *Goode v. Harrison* (1821) 3 B. & Ad. 147, 157; 24 R. R. 307, 314.

into a partnership business and that of one on whose behalf an ancestral trade is carried on by his guardian. A minor Hindu, therefore, on whose behalf such a trade is carried on, is not personally liable for the debts incurred in such trade, but his share therein is alone liable (s). Sa
247, 248.

248.—A person who has been admitted to the benefit of partnership under the age of majority becomes, on attaining that age, liable for all obligations incurred by the partnership since he was so admitted, unless he gives public notice, within a reasonable time, of his repudiation of the partnership.

In England an infant partner who continues to act as a member of the firm after his full age, or, having acted as such during his minority, does not disclaim, is answerable for debts of the firm contracted since his majority, because he is at least an ostensible partner. But he is not conclusively held to ratify obligations contracted during his minority (t). The present section, by including such obligations, has distinctly enlarged the creditor's rights. As regards a joint Hindu family firm, it has been held that a member of the family on attaining majority does not necessarily become personally liable for debts contracted in the joint family business during his minority (u).

We have not to consider here the position of an infant shareholder in an incorporated company; but the case is expressly covered by the Transfer of Property Act, 1882, s. 127, whereby an "onerous gift to" a "disqualified person" must be retained after full age, etc., with the burden, if at all (v).

(s) *Joykisto v. Nityanund* (1878) 3 Cal. 738; *Rampartab v. Fookibai* (1896) 20 Bom. 767, 777, 778; *Grey v. Lamond Walker* (1913) 40 Cal. 523; *Sanyasi Charan Mandal v. Asutosh Ghose* (1915) 42 Cal. 225; *Khetra Mohan v. Nishi Kumar* (1917) 22 Cal. W. N. 489; *Sanka Krishna v. The Bank of Burma* (1912) 35 Mad. 692; *Narain Das v. Ralli Brothers* (1915) Funj. Rec. no. 61, p. 270.
(t) *Goode v. Harrison* (1821) 3 B. & Ad. 147, 157; 24 R. R. 307, 314.
(u) *Official Assignee of Madras v. Palaniappa Chetty* (1918) 41 Mad. 824.
(v) *Fazulbhoy v. The Credit Bank of India* (1914) 16 Bom. L. R. 730.

S. 249.

249.—Every partner is liable for all debts and obligations incurred while he is a partner in the usual course of business by or on behalf of the partnership; but a person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of such firm for anything done before he became a partner.

Partner's liability
for debts of part-
nership.

Nature of partnership liabilities.—The first branch of this section represents what was supposed to be the rule of equity in England before the House of Lords decided, in 1879, that a partner during his lifetime is not severally liable for debts of the firm, but only jointly with the other partners (*w*), though a deceased partner's estate can be made severally liable; and liability for wrong or fraud committed in the course of partnership business is also joint and several (P. A. s. 12). These peculiarities of English law do not concern us here. The second branch is in itself elementary; but arrangements for transferring debts from the members of an old firm to a new firm are not uncommon, and, if assented to by the old creditors, may constitute a complete novation. Where the business is carried on continuously, the creditors knowing of the change, both the assumption of the existing debts by the new partners and the assent of the creditors to accept them as debtors and to discharge the retiring partners will be rather easily inferred (*x*). Mere continuance, in an existing transaction or account, of the usual course of business with the firm with notice of the death or retirement of a partner will not amount to a novation (*y*). There must be a distinct new transaction amounting to a new contract with the surviving or remaining members of the firm (*z*).

Section 17 of the English Act deals more explicitly with this matter; and see more as to assuming liability by novation in the commentary on s. 62, p. 342, above, where several of the cases cited relate to a change in the members of a partnership, though

(*w*) *Kendall v. Hamilton*, 4 App. Ca. 504; P. A. s. 9. deposit note taken for balance after drawing on deposit account).

(*x*) *Rolfe v. Flower* (1866) L. R. 1 P. C. 27, 40, 44. (*z*) *Re Head* (No. 2) [1894] 2 Ch. 226 (transfer from current to deposit account).

(*y*) *Re Head* [1893] 3 Ch. 426 (fresh count).

there is nothing peculiar to the contract of partnership in the principle applied. ss.
249, 25

The obligations for which a partner is liable under the first branch of the present section include whatever is incidental to an entire contract which he authorised, expressly or in the usual course of business, while he was still in the firm. A retainer given on behalf of a firm to a solicitor forms one continuing contract for the conduct of the action; and a partner, known or unknown to the solicitor, who leaves the firm while the action is pending, is liable for the costs incurred under the retainer after as well as before his retirement (a). This is the case of actual, not ostensible, continuing authority, and has nothing to do with estoppel, and therefore the creditor's knowledge or belief as to the members of the firm is immaterial.

Though a contract may be entered into by one partner in his own name only, his co-partners will be liable to be sued on the contract, though not known to the other party at the date of the contract to be a partner, if the contract was in fact signed by the partner as agent of the firm (b), and oral evidence is admissible to show that the contract was so signed (c). The reason of the leading case is general and applies to all undisclosed principles.

250.—Every partner is liable to make compensation to third persons in respect of loss or damage arising from the neglect or fraud of any partner in the management of the business of the firm.

Partner's liability to third person for neglect or fraud of co-partner.

Ground of liability; usage of firm, how material.—The principle of this section is a branch of the universal rule that every one must answer for the acts and defaults of his servants or agents in the course of their employment. For the general illustration of this rule the text-books on the Law of Torts may be consulted. As

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- (a) *Court v. Berlin* [1897] 2 Q. B. 396, C. A. provisions of ss. 91 and 92 of the Indian Evidence Act, for what those sections exclude is admission of oral evidence to alter or add to the "terms of a contract," and the question as to who the contracting parties are is not a "term" of a contract.
- (b) *Beckham v. Drake* (1841) 9 M. & W. 79; 60 R. R. 678.
- (c) *Venkatasubbiah Chetty v. Govindarajulu Naidu* (1908) 31 Mad. 45. This view is quite consistent with the

250. regards the application of it now before us, the chief difficulty that occurs in practice is that of knowing whether the neglect or fraud of a partner really took place "in the management of the business of the firm," or was only his own particular wrong, for which his position in the firm gave him an opportunity (*d*). Where the default consists, as it usually does, in the misappropriation of money which a customer or client was minded to entrust to the firm, it is material to consider whether it ever came into the firm's custody; for in this case the firm is liable for misappropriation by a partner, whether he was the partner originally trusted or not, and whether he acted in the exercise of apparently regular authority or not (P. A. s. 11). Further the question whether a partner was acting on behalf or with the ostensible authority of the firm can seldom be answered except by reference to the expectations created either by the special usage of that firm, or by what is usual in that kind of business generally. Depositing securities with a banker for safe custody will make his firm responsible for a misappropriation of them; but putting money in the hands of one member of a banking firm to be invested at his discretion will not; for the former transaction is within the scope of what bankers in England habitually do for their customers, the latter is outside it (*e*). Similar distinctions hold where solicitors are employed in money matters. Receipt of money with instructions to invest it in a specific manner binds the firm, as being in the ordinary way of solicitors' business (*f*), but if the instructions are general to invest at the solicitor's discretion, it does not (*g*). But a particular firm may widen its responsibility by habitually undertaking particular kinds of business for its clients (*h*).

A firm may also be liable for money which has come into its funds by the irregular or fraudulent act of either a partner (*i*) or an

(*d*) See *Munshi Basiruddin Mullick v. Surja Kumar Naik* (1903) 12 C. W. N. 716, at p. 719.

(*e*) Contrast *Clayton's Case* (1816) 1 Mer. 572, 579, with *Bishop v. Countess of Jersey* (1854) 2 Drew. 143; 103 R. R. 51.

(*f*) *Blair v. Bromley* (1847) 2 Ph. 354; 71 R. R. 213.

(*g*) *Harman v. Johnson* (1853) 2 E. & B. 61; 95 R. R. 429

(*h*) *Rhodes v. Moules* [1835] 1 Ch. 236, C. 4.

(*i*) *Marsh v. Keating* (1834) 1 Ring. N. C. 198; 2 Cl. & F. 250, 289; 37 R. F. 75, 106; *Hurruck Chand v. Gobind Lal Khetry* (1906) 10 C. W. N. 1953 (where one of two partners who dealt in piece goods stole piece goods, the property of a merchant, and credited the sale proceeds to the firm).

agent who is not a partner (j), and this whether the act was in the ordinary course of business or not, at all events if the partners knew or might have known of the payment and its source. But this does not really depend on anything specially belonging to the law of partnership. 8. 256

This section does not in terms cover the case of a partner committing, in the supposed interest of the firm, a wilful wrong, other than fraud, against a third person ; but it cannot be doubted that in such a case the firm may be liable under the wider principle mentioned above. In a recent English case one of two partners bribed the clerk of the plaintiff, who was a competitor of the firm, to disclose certain information as to the plaintiff's operations which as between him and his employer was confidential ; it was in the course of the firm's business to obtain such information by proper means. Both partners were held liable to the plaintiff (k).

It has been said in the Bombay High Court that a malicious prosecution by the managing partner of a firm does not render the other members of a firm liable in damages, unless it is shown that the firm was in some way or other concerned in the prosecution and had instigated it (l). The result in this particular case may well be right, on the ground of want of authority, either general or special, and the language of the Court may have been appropriate in the circumstances, but it is submitted that this cannot be relied on as a general test. If a prosecution was undertaken on behalf of a firm by a member of it (or any other agent) having general authority to prosecute on behalf of the firm in a proper case ; if the prosecutor was acting with a view, however perverse or erroneous, to the interest of the firm, and not merely for his private purposes ; and if the prosecution was in fact malicious in the sense of being undertaken without reasonable cause, and in order to damage a person obnoxious to the firm rather than to advance justice, then, it is conceived, the partners in the firm would be liable, according

(j) *Reid v. Rigby & Co.* [1891] 2 1 K. E. 81, C. A.
Q. B. 40.

(l) *Ahmedshahi v. Framji* (1903) 28

(k) *Hamlyn v. Houston & Co.* [1903] 608. 226.

38. to principle and the English authorities, whether at the time they
 251. knew anything of the prosecution or not (m).

Wrongful employment of trust property by a trustee in a business in which he is a partner is specially dealt with by the Trusts Act, 1882, s. 67, with which compare P. A. s. 13.

251.—Each partner who does any act necessary for, or
 Partner's power usually done in, carrying on the business of
 to bind co-part- such a partnership as that of which he is a
 ners. member binds his co-partners to the same extent as if he
 were their agent duly appointed for that purpose.

Exception.—If it has been agreed between the partners that any restriction shall be placed upon the power of any one of them, no act done in contravention of such agreement shall bind the firm with respect to persons having notice of such agreement.

Illustrations.

(a) A. and B. trade in partnership, A. residing in England, and B. in India. A. draws a bill of exchange in the name of the firm. B. has no notice of the bill, nor is he at all interested in the transaction. The firm is liable on the bill, provided the holder did not know of the circumstances under which the bill was drawn.

(b) A., being one of a firm of solicitors and attorneys, draws a bill of exchange in the name of the firm without authority. The other partners are not liable on the bill (n).

(c) A. and B. carry on business in partnership as bankers. A sum of money is received by A. on behalf of the firm. A. does not inform B. of such receipt, and afterwards A. appropriates the money to his own use. The partnership is liable to make good the money.

(d) A. and B. are partners. A., with the intention of cheating B., goes to a shop and purchases articles on behalf of the firm, such as might be used in the ordinary course of the partnership business, and converts them to his own separate use, there being no collusion between him and the seller. The firm is liable for the price of the goods. [*Bond v. Gibson* (1803) 1 Camp. 185; 10 R. R. 665.]

(m) This conclusion seems to follow *a fortiori* from the rule, now settled (*Citizen's Life Assurance Co. v. Brown* [1901] A. C. 423), that a corporation may be sued for malicious prosecution.

(n) "For it is no part of the ordinary business of a solicitor to draw, accept, or endorse bills of exchange": Lindley, 158.

Question as to necessity.—This section lays down the general rule of the partners' responsibility for partnership affairs transacted in the ordinary course. It is not easy to see why it follows instead of preceding a series of sections dealing with various more special and less usual kinds of liability. In England the corresponding enactment (P. A. s. 5) more boldly says that every partner is an agent of the firm and of his other partners; and this may be preferable; but the result is the same. In one respect the powers of a partner are perhaps extended beyond the limits set by the common law. The only necessity which the English authorities recognise as conferring authority is the necessity of carrying on the business in the usual way. Extraordinary occasions will not confer extraordinary power on a partner or manager: "a power to do what is usual does not include a power to do what is unusual, however urgent" (o); and a firm whose usual course of business did not require or include borrowing money has been held "not liable for money borrowed by its agents under extraordinary circumstances, although money was absolutely necessary to save the property of the firm from ruin" (p). "There is no rule of law that an agent may, in a case of emergency suddenly arising, raise money and pledge the credit of his principals for its repayment" (q), nor any English authority giving a partner greater power in this behalf than any other agent. But the words of the present section "necessary for carrying on the business of such a partnership as that of which he is a member" may be read, and it seems the more natural reading, as including what is necessary in the circumstances of the special occasion, and not as confined to what is necessary in the usual course of business. It may be doubtful whether this point was really considered by the framers of the Act; at all events it would be desirable, if the Act is ever revised, to make it quite clear one way or the other.

General presumptions of authority in partnership affairs.—Apart from the case of extraordinary necessity, which has not often to

(o) *Lindley*, 157, approved by North, 7 M. & W. 595; 56 R. R. 803.
 J., *Re Cunningham & Co.* (1887) 36 (q) *Alderson, B.*, 7 M. & W. 600
 Ch. D. 532, 538. 56 R. R. 810.
 (p) *Ib.*: *Hawthorne v. Bourns* (1841)

S. 251. be considered, and subject to the Exception (of which later), the test of an act binding the firm is whether it is usual in that kind of business. Particular firms may have their own usages; but a considerable number of rules of common application have become settled in practice. They were summed up by Story, and his exposition was approved by the Judicial Committee many years ago.

“The general power of partners in ordinary trading partnerships, and the restrictions upon such powers, appear to us to be stated with great accuracy by Mr. Justice Story in his treatises on Partnership and on Agency, and we willingly adopt his language. In the latter of his works (Chap. VI., ss. 124 and 125) the law is thus stated: s. 124. ‘Every partner is, in contemplation of law, the general and accredited agent of the partnership, or, as it is sometimes expressed, each partner is *præpositus negotiis societatis*, and may, consequently, bind all the other partners by his acts in all matters which are within the scope and objects of the partnership. Hence, if the partnership be of a general commercial nature, he may pledge or sell the partnership property; he may buy goods on account of the partnership; he may borrow money, contract debts, and pay debts on account of the partnership; he may draw, make, sign, endorse, accept, transfer, negotiate, and procure to be discounted, promissory notes, bills of exchange, cheques, and other negotiable papers in the name and on account of the partnership.’ S. 125. ‘The restrictions of this implied authority of partners to bind the partnership are apparent from what has been already stated. Each partner is an agent only in and for the business of the firm; and, therefore, his acts beyond that business will not bind the firm. Neither will his acts done in violation of his duty to the firm bind it when the other party to the transaction is cognisant of, or co-operates in, such breach of duty.’”

Their Lordships went on to say:—

“That, in ordinary trading partnerships, the power of borrowing money for partnership purposes exists, and that bills or notes given by one of the partners in the partnership firm for money so borrowed will bind the firm, is too clear to require any authority” (r).

(r) *Bank of Australasia v. Breillat* (1847) 6 Moo. P. C. at pp. 193, 194; 79 R. R.

In a later case Lord Justice James said :—

S. 251.

“ Ordinary partnerships are by the law assumed and presumed to be based on the mutual trust and confidence of each partner in the skill, knowledge, and integrity of every other partner. As between the partners and the outside world (whatever may be their private arrangements between themselves), each partner is the unlimited agent of every other in every matter which is partnership business, or which he represents as partnership business, and not being in its nature beyond the scope of the partnership ” (s).

There is no converse presumption that the firm is the agent of the partners, and, therefore, although payment to one partner is generally a good payment to the firm, payment to the firm of a private debt due to one partner is not a discharge unless it is shown that the firm had in fact authority to receive it (t).

Subject to the rules or presumptions established for transactions of common occurrence, of which examples are given in the illustrations to this section, there is no better guidance than Lord Lindley's statement: “ The question whether a given act can or cannot be said to be done in carrying on a business in the way in which it is usually carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is therefore necessarily admissible ” (u).

Admissions by partners.—“ An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm ”: P. A. s. 15. This is not specified in the Indian Act, but it is an obvious and recognised consequence of a partner's general authority in the affairs of the firm. As to admissions in general and their effect, see the Evidence Act, I of 1872, ss. 17—23. Authority is not needed to show that a partner's admission is at most evidence against

(s) *Baird's Case* (1870) L. R. 5 Ch. 725, 733. The decision was in the winding up of an unincorporated joint stock company (of a type now obsolete and probably extinct) to which the prin-

ciples of ordinary partnership were held not to be applicable.

(t) *Powell v. Brodhurst* [1901] 2 Ch. 160.

(u) *Partnership*, p. 158.

8. 251. the firm; it is no more against himself (*v*). Of course a partner cannot increase his authority to bind the firm by any statement of his own about it (*w*).

Notice to partner.—Notice to any habitually acting partner of anything relating to partnership affairs is generally notice to the firm: P. A. s. 16; Lindley, 160 *sqq.*; except where that partner is himself committing or taking part in a fraud upon the firm. It has never been decided whether “notice to a man who afterwards becomes a partner is notice to the firm.” Sir G. Jessel thought “it might be so held” (*x*).

Authority in particular transactions.—The following points as to the authority of partners to bind the firm have been decided in the Indian High Courts:—

Acknowledgment of Debt by a Partner.—The mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partner, unless it can be shown that he had authority, express or implied, to do so. According to the Bombay and Allahabad decisions, such authority is to be presumed in a going mercantile concern as an ordinary rule (*y*). According to the Madras decisions, evidence of authority from the other partners is necessary and cannot be presumed (*z*). After dissolution, however, express authority must be proved (*a*), except, it must be remembered, when a partner is exercising the power given by s. 263, p. 824, below (*cp.* P. A. S. 38). See Indian Limitation Act, 1908, s. 21.

(*v*) See, if desired: *Stead v. Sall*, 3 Bing. at p. 103; 28 R. R. at p. 604.

(*w*) *Ex parte Agace* (1792) 2 Cox 312; 2 R. R. 49.

(*x*) *Williamson v. Barbour* (1877) 9 Ch. Div. at p. 535.

(*y*) *Premji v. Dossa* (1886) 10 Bom. 358; *Dalsukhrum v. Kalidas* (1902) 26 Bom. 42; *Gadu Bibi v. Parsotam* (1888) 10 All. 418. In *Dalsukhrum v. Kalidas*, Candy, J., referred with approval to Scott, J.’s ruling in *Premji v. Dossa*, but the

Court eventually sent down an issue whether the acknowledgment was or was not an act necessary for or usually done in carrying on the business of the partnership.

(*z*) *Valasubramania v. Ramana-than* (1909) 32 Mad. 421; *Shaik Mohideen v. Official Assignee of Madras* (1912) 35 Mad. 142; *K. R. V. Firm v. Seetharamaswami* (1914) 37 Mad. 146, 152.

(*a*) *Premji v. Dossa* (1886) 10 Bom. 358; *Rajagopala v. Krishnasami* (1898) 8 Mad. L. J. 261.

Arbitration.—One partner has no power in the absence of special authority to bind the firm by a submission to arbitration (b). S. 251.

Bills of Exchange.—Every partner in a mercantile or ordinary trading partnership is liable upon bills, drawn by a partner in the recognised trading business of the firm, for a transaction incident to the business of the firm, although such partner's name does not appear upon the face of the instrument (c).

Lease or Mortgage.—It has been held by the High Court of Bombay that where one partner takes a lease of premises in his own name, though on behalf of the partnership, and with the assent of the other partners, the latter are not liable to be sued by the lessor for the rent reserved by the lease (d). The decision proceeds on the ground that a lease is not a mere contract, but a conveyance by way of demise, and the person covenanting to pay the rent is the person to whom the demise is made only. The better opinion, however, would seem to be that the other partners are liable for the rent, though their names do not appear on the lease provided the lease was taken for the partnership, and this accords with the view of the Madras High Court in a later case (e). And it has been held by the Judicial Committee that a mortgage of a village which was partnership property made by some of the partners for the benefit of the firm is binding on a member of the firm though not executed by him (f). And likewise the manager of a joint Hindu family can bind the other co-partners by a mortgage of family property executed in his own name for the purpose of carrying on the family business (g). In a recent Madras case (h) Wallis, J., after referring to that case said, "If, as held, I think rightly, in that case, a partner in India can mortgage partnership property by deposit of title deeds,

(b) *Ram Bharose v. Kallu Mal* (1899) 22 All. 135, following English authorities; *Datobhoy Hassam v. Vallu Mahomed* (1899) 1 Bom. L. R. 828.

(c) *Bunarsee Dass v. Gholam Hoosein* (1870) 13 M. I. A. 358.

(d) *Ragoonathdas v. Morarji* (1892) 16 Bom. 568, citing *Walters v. Northern Coal Mining Co.*, 5 De G. M. & G. 629; 404 R. R. 232.

(e) *Chinnaramanuja v. Padmanabha*

(1896) 19 Mad. 471, 476.

(f) *Juggeewandas v. Ramdas* (1841) 2 M. I. A. 487.

(g) *Benoka v. Mohun* (1880) 5 Cal. 792. We purposely abstain from referring to English decisions involving the technicalities of English real property law.

(h) *Asan Kani v. Somasundaram* (1908) 31 Mad. 206.

- §. 251. there is, I think, no good reason why he should not effect a legal mortgage as well. The observation of Straight, J., in *Harrison v. Delhi and London Bank* (i), that in India the presumption is against the existence of such a power, was made in the case of a partnership between Englishmen, and I am unable to agree with it, especially as applied to natives of India."

Exception : restriction of authority.—P. A. s. 8 is all but literally identical with this. It is obviously not just that a third person should be able to hold the firm liable for an act of one partner which he knew to be unauthorised ; and such knowledge is necessarily conveyed by notice that the partner's authority is expressly restricted, in that particular, by the partnership agreement. It has been suggested by high authority (j) that there may be restrictive agreements among partners which are only, so to speak, internal agreements for penalty or indemnity to be paid by a partner if he does certain things, but do not deprive him of his authority to bind the firm towards third persons if nevertheless he does them. It would seem, with great respect, that if such an argument is ever urged in practice the Court must consider, with regard to the terms or circumstances in the particular case, whether there is or is not an agreement restraining the power of the partner in question to bind the firm. It is a question of construction for which no rule can be laid down beforehand, and which perhaps is not very likely to arise.

Where a partner has neither real nor apparent authority, that is, has not authority in fact, and is not known or believed to be a partner by the person with whom he deals, his act will not bind the firm (P. A. s. 5) (k). This case is not expressly within the words of the present exception, but the principle is clear, and we see no reason why it should not be applied by Indian Courts on occasion.

Another case more expressly provided for in the English Act is that of a partner purporting to bind the firm in a matter, on the face of it, outside the firm's usual business. P. A. s. 7 enacts that "where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the

(i) 4 All. 437, 459.

(j) Lindley, 212 *sqq.*

(k) *Cp. Nicholson v. Ricketts* (1860)

2 E. & E. 497, 524 ; 119 R. R. 816, 831,

832 ; *Holme v. Hammond* (1872) L. R.

7 Ex. 218, 233.

firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner." This is really contained in the authorities referred to above (p. 666-667). The principle is applicable in the case (among others) of a partner raising money on the credit of the firm in such circumstances that the lender knows the loan to be intended for the borrower's private use and not for partnership purposes. In such a case the separate creditor must know that the partner is acting outside his normal authority, and therefore he cannot hold the firm liable unless there is in fact express authority from the other partners (l). Will reasonable belief in the existence of express authority be enough to justify the creditor in holding the firm liable? On principle it would seem not, except so far as that belief may have been induced by the conduct of all or some of the other partners; in which case those who have so acted may well be liable personally, having in effect held out the borrowing partner as authorised. But "the mistaken belief that the one partner had that authority" (to appropriate money coming from partnership funds to his private account) "cannot prejudice the right of the other, if the other did nothing to induce such a belief" (m). Similarly an indorsement of a negotiable instrument by one partner in the name of the firm, but without authority and for his own private purposes, confers no title on an indorsee having notice of the purpose and no reason to believe that there is authority (n).

252.—Where partners have by Contract regulated and defined, as between themselves, their rights and obligations, such contract can be annulled or altered only by consent of all of them, which consent must either be expressed, or be implied from a uniform course of dealing (o).

(l) *Kendal v. Wood* (1871) in Ex. Ch., L. R. 6 Ex. 248, at p. 253, per Montague Smith, J.

(m) *Ibid.*, per Lush, J., at p. 254.

(n) *Garland v. Jacob* (1873) L. R. 8 Ex. 216, Ex. Ch.

(o) This section does not interfere

with a judge's exercise of discretion under s. 254, which will not be reviewed if not shown to be capricious or to disregard any legal principle: *Rehmat-un-Nissa Begam v. Price* (1917) 45 Ind. App. 61, 42 Bom. 380.

88.
252, 253.

Illustration.

A., B., and C., intending to enter into partnership, execute written articles of agreement, by which it is stipulated that the net profits arising from the partnership business shall be equally divided between them. Afterwards they carry on the partnership business for many years, A. receiving one-half of the net profits, and the other half being divided equally between B. and C. All parties know of and acquiesce in this arrangement. This course of dealing supersedes the provision in the articles as to the division of profits.

Variations by consent.—This is elementary law. Perhaps the last few words are the most important.

“Partners, if they please may, in the course of the partnership daily come to a new arrangement for the purpose of having some addition or alteration in the terms on which they carry on business provided those additions or alterations be made with the unanimous concurrence of all the partners” (*p*).

Thus a standing practice of the firm as to the mode of valuing assets (*q*) or adjusting profit and loss account (*r*) is binding until altered by consent, whether part of the original agreement or not.

253.—In the absence of any contract to the contrary the relations of partners to each other are determined by the following rules :—

Rule determining partners' mutual relations, where no contract to contrary.

(1) all partners are joint owners of all property originally brought into the partnership stock, or bought with money belonging to the partnership, or acquired for purposes of the partnership business. All such property is called partnership property. The share of each partner in the partnership property is the value of his original contribution, increased or diminished by his share of profit or loss :

(2) all partners are entitled to share equally in the profits of the partnership business, and must

(*p*) Lord Langdale, M.R., *England G. J. & S. 320.*
v. Curling (1844) 8 Beav. 129, 133; 68 (*r*). *Ex parte Barber* (1870) L. R. 5
 R. R. 39, 42. Ch. 687.
 (*q*) *Coventry v. Barclay* (1864) 3 De

contribute equally towards the losses sustained by the partnership : S. 253.

- (3) each partner has a right to take part in the management of the partnership business :
- (4) each partner is bound to attend diligently to the business of the partnership, and is not entitled to any remuneration for acting in such business :
- (5) when differences arise as to ordinary matters connected with the partnership business, the decision shall be according to the opinion of the majority of the partners ; but no change in the nature of the business of the partnership can be made, except with the consent of all the partners :
- (6) no person can introduce a new partner into a firm without the consent of all the partners :
- (7) if from any cause whatsoever, any member of a partnership ceases to be so, the partnership is dissolved as between all the other members :
- (8) unless the partnership has been entered into for a fixed term, any partner may retire from it at any time :
- (9) where a partnership has been entered into for a fixed term, no partner can, during such term, retire, except with the consent of all the partners, nor can he be expelled by his partners for any cause whatever, except by order of Court :
- (10) partnerships, whether entered into for a fixed term or not, are dissolved by the death of any partner.

l. 253. It must be well observed that all the rules laid down in this section have effect only so far as they are not excluded by any agreement of the partners, which agreement need not be formal or even express. We shall now consider the sub-sections in order.

Sub-s. (1): Partnership property.—Property belonging to the partners, or to one of them, does not become partnership property merely by being used for the purposes of the business (s). It will become so only if the partners show an intention to make it so, as where the owner of a mill agrees to carry on the manufacture in partnership with others, and is credited in the accounts of the firm with the value of the mill and plant as his capital. In that case both the mill and any subsequent additions to the site and plant are partnership property, and any increased value obtained for them on a sale of the business is divisible as partnership profits (t). Similarly where in subsequent dealings between the partners, one partner's share in the land and business is treated as an undivided whole (u). The nature of the business may also be material (v).

Goodwill.—Partnership property generally includes goodwill, so far as it exists and has exchangeable value (v). Nothing is said either in this or in the English Act about the incidents of goodwill, probably because, although they often have to be considered in partnership cases, they may no less be material in other cases of a business being transferred by sale or devolution of the trader's interests. "Goodwill" is properly a commercial term, signifying the value of the business in the hands of a successor, so far as increased by the continuity of the undertaking being preserved in the shape of the right to use the old name and otherwise. It is something more than the mere chance or probability of old customers maintaining their connection, though this is a material part of the practical fruits; it may be summed up as "the whole advantage, whatever it may be, of the reputation and connection of the firm" (w). But

(s) *Lindley*, 391; *Davis v. Davis* [1894] 1 Ch. 393. partner's death "the goodwill of the business would be an asset, and might

(t) *Robinson v. Ashton* (1875) L. R. 20 Eq. 25. well be the most valuable asset, of the partnership": *Re David and Matthews*

(u) *Waterer v. Waterer* (1873) L. R. 15 Eq. 402. [1899] 1 Ch. 378, 382, per Romer, J.; *Jennings v. Jennings* [1898] 1 Ch. 378.

(v) *Levy v. Walker* (1879) 10 Ch. Div. 436, 446. On dissolution by one [1896] A. C. at p. 24. (w) *Lord Macnaghten, Trigo v. Hunt*

a series of decisions has now given it a pretty definite legal character. S. 253.
 A sale of goodwill conveys to the buyer (in the absence of any special provisions) the exclusive right of representing himself as the successor to the business, and also that of using the old name, provided that the seller is not thereby exposed to liability as an ostensible partner (x). Whether there is any substantial risk of which he can complain is a question of fact (y). It includes the benefit of any covenant by a partner not to carry on for a fixed time any business competing with that of the firm (z). It does not bind the seller not to compete with his successor (a), but he must not specially solicit the customers of the old firm (b), even those who may of their own accord have continued to deal with him (c).

The importance of goodwill as compared with other assets of a firm necessarily varies according to the nature of the business. In some kinds of business it may be inappreciable (d).

Assets: benefit of contracts.—A contract on the part of a limited company, such as occurred in *Bachubai v. Shamji* (e), to continue to employ a firm as its agents, is not a valuable asset in which the legal representative of a deceased partner of the firm would be entitled to participate. The profits in respect of such a contract would be derived entirely from, and would depend absolutely upon, the services of the surviving partners, and it is not one in respect of which any liability could be incurred by the estate of the deceased partner. But contracts of the character found in *Ambler v. Bolton* (f) and *McClellan v. Kennard* (g) constitute valuable assets, being in their nature such as would have rendered the estate of the deceased partner liable in the event of loss.

Partner's share.—The only conclusive measure of a partner's share is what he is entitled to claim on the termination of the partnership, or could at any given time claim if the partnership had at

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| (x) <i>Thynne v. Shove</i> (1890) 45 Ch. Div. 577; <i>Re David and Matthews</i> [1899] 1 Ch. 378. | (b) <i>Trego v. Hunt</i> [1896] A. C. 7. |
| (y) <i>Burchell v. Wilde</i> [1900] 1 Ch. 551, C. A. | (c) <i>Curl Brothers v. Webster</i> [1904] 1 Ch. 685. |
| (z) <i>Townsend v. Jarman</i> [1900] 2 Ch. 698. | (d) See <i>Stewart v. Gladstone</i> (1879) 10 Ch. Div. 626, 657. |
| (a) <i>Cook v. Collingridge</i> (1825) 27 Beav. 459; 23 R. R. 767. | (e) (1885) 9 Bom. 536, 555, 556. |
| | (f) (1872) L. R. 14 Eq. 427. |
| | (g) (1874) L. R. 9 Ch. 336. |

S. 253. that time to be wound up and its assets realised and distributed. There is no section in this Act corresponding to P. A. s. 44 and providing for the order of distribution, for s. 262 corresponds only to the English rule in bankruptcy; but as P. A. s. 44 was not intended to alter the effect of existing English authority, nor does any such intention appear in this part of the Contract Act, the rules are probably the same in England and in British India. A partner's share does not include advances made by him to the firm beyond his contributions of capital. Such advances, though postponed to the claims of outside creditors, are as between the partners preferred debts from the firm to the lending partner, and repayable in priority to payment out of capital. In England they carry 5 per cent. interest from their date (P. A. s. 24, sub-s. (3); Lindley, 452); and subject to any local reason for varying the rate, we presume the same rule would be applied in India.

Sub-s. (2): Share in profits and losses.—As this section lays down a presumption in the case of partners as to equality of shares, the burden of proof lies on the party who sets up an agreement to the contrary (*h*).

In England, and presumably here, losses and deficiencies of capital are to be made up by contribution from the partners in the same way as other losses, namely (in the absence of any more specific agreement) in the proportion in which the partners were entitled to share profits, whether that is or is not the same as the proportion of their capital (*i*). The assets, after being made up by such contribution, are to be applied, subject to satisfaction first of outside creditors and then of partners' advances, "in paying to each partner rateably what is due from the firm to him in respect of capital, account being taken of the equal contributions [in the case before the Court profits were divisible in equal shares] to be made by him towards the deficiency of capital" (*j*). That is, his claim for capital is "the value of his original contribution . . . diminished by his share of . . . loss" (sub-s. (1), p. 806 above), and that share is

(*h*) *Jadobram v. Bulloram* (1899) 26 Cal. 281; *Keshav v. Rayapa* (1875) 12 B. H. C. 165, 171. less intended to confirm; *Binney v. Mutrie* (1886) 12 App. Ca. 160, 165, J. C., where the rule is treated as clear.

(*i*) *Nowell v. Nowell* (1869) L. R. 7 Eq. 538, which P. A. s 44 was doubt- (j) *Garner v. Murray* [1904] 1 Ch. 57, 60.

equal if his share of profits would have been equal (sub-s. (2)). Our Act appears to be in strict accordance with English authorities, though less fully expressed than the English Act. S. 258

If one partner is insolvent, the burden of his contribution to a loss of capital is not to be thrown on the solvent partners after debts to outside creditors have been paid. A., B., and C. are partners who have contributed capital in unequal shares, but share profits equally. On winding up the business the capital, after satisfying the external debts and advances made by A. and B., is found to be deficient by Rs. 15,000. A. and B. are solvent and C. is insolvent. A. and B. have to contribute only Rs. 5,000 each, not Rs. 7,500. The remaining capital, increased by these contributions, is divisible between A. and B. in the proportion of their original shares of capital, C. remaining in debt to the firm. There is nothing in P. A. s. 41 "to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share" (k).

Partner's right to indemnity and contribution.—These rights, which are not expressly laid down in the Contract Act, are stated in P. A. s. 24, sub-s. (2). In addition to the ordinary claim of an agent to be indemnified (see s. 222, p. 726 above), a partner may be entitled to reimbursement for what may be called emergency or salvage expenses incurred by him personally on behalf of the firm in circumstances of extraordinary requirement. Money payments to satisfy debts of the firm are the commonest examples under this head. There may also be urgent and necessary payments required for keeping the business of the firm in existence as a going concern; thus in a mining business it may be necessary to sink a new shaft promptly to get at unexhausted minerals. Claims of this kind are somewhat anomalous, and justified only by necessity, and the Court is not disposed to extend their scope (l). But when extraordinary expenditure of this kind is once found to be authorised by necessity, the necessity found to exist is the only measure of the amount which can be allowed as proper; there is no rule whereby it is limited to

(k) *Garner v. Murray*, last note.

Co.'s Case (1853) 4 D. M. & G. 19;

(l) *Esparle Williamson* (1869) L. R. 102 R. R. 7.

5 Ch. 309, 313; *The German Mining*

3. 253. the nominal capital of the concern (*m*). No recent decisions have been found on the topic, and in fact the English reported cases mostly, if not wholly, arose in the early period of joint-stock enterprise and under conditions which modern company law has superseded. Only one case on a private partnership is known to the writer which illustrates the principle, and there the point is not very clear or conspicuous (*n*).

Sub-s. (3), (4): Right and duty of partners to attend to business.—It is quite common in practice to provide by express agreement that this or that partner need not, sometimes even that he may not, take any active part in the business, and also for the payment of salary to a managing or active partner. Any such salary will of course rank, in taking accounts as between the partners, as a debt from the firm. The latter part of sub-s. (4) does not touch the case of undue labour and trouble being imposed on one partner by another's wilful neglect of the business to which he ought to attend. A partner on whom the whole conduct of the business has been thrown in this manner is entitled to compensation (*o*).

Sub-s. (5): Power of majority.—This power, though not in itself of a judicial kind, is subject to the rule of natural justice which governs quasi-judicial powers of private persons and bodies in general. Every partner must have an opportunity of being heard, and the decision must be made in good faith with a view to the collective interest of the firm (*p*). Being so made, it is conclusive, as in other analogous cases.

Not only the nature of the business, but the place where it is carried on, may not be varied without the consent of all the partners (*q*).

Sub-s. (6): New partners; assignment of share.—The effect of this sub-section "is not to render an assignment of a share in a partnership concern illegal or void as between the parties to the assignment,

(*m*) 4 D. M. & G. at p. 42; 102 496, 525; 24 R. R. 108, 132.

R. R. 19.

(*n*) *Burdon v. Barkus* (1862) 4 D. F. & J. 42; 135 R. R. 19.

(*o*) *Airey v. Borham* (1881) 29 Beav. 620; 131 R. R. 736.

(*p*) *Const v. Harris* (1823) T. & R.

(*q*) One partner alone cannot even renew a lease of the site where the business, or part of it, has been carried on: *Clements v. Norris* (1878) 8 Ch. Div. 129.

but only so far void as between these parties and the other partner or partners as to cause an immediate dissolution of the partnership. In other words, one partner cannot by assigning his share make any one else a partner in his stead with his co-partners; and therefore upon his assigning his share the partnership ceases to exist, unless the other partners consent to accept the purchaser as a partner in the place of the latter. If they do so consent, the partnership may continue to be carried on as before. If they do not consent, the plaintiff would upon the dissolution (r) have a right to sue, not as a partner, but as an assignee of the rights of his assignor in the partnership property, for an account of that property, and for such a distributive share as belonged to his assignor" (r).

Express power for a senior or principal member of a firm to introduce one or more new partners, named or not named, under agreed conditions, is in fact constantly given by partnership articles. A person duly nominated under such a power acquires rights in the partnership property which the Court will enforce by way of appropriate specific relief (s), though it cannot enforce an agreement to enter into partnership, because the foundation of partnership is mutual confidence, which the Court cannot supply where it does not exist.

Though a member of a joint Hindu family cannot sue for an account of the profits of a partnership which is alleged to be joint family property and for an award to him of his share therein (t), he is entitled to an injunction if he is excluded from the management of the family business (u). But the relief in such a case is granted not on the specific rules as to the law of partnership, but upon the general principle that one member of an undivided Hindu family cannot be ousted by others from any item of family property (v).

(r) *Juggut Chunder v. Rada Nath* (1884) 10 Cal. 669. In England such an assignee is not now entitled to an account during the continuance of the partnership, and such was the better opinion before the Act: P. A. s. 31, for the working of which see *Watts v. Driscoll* [1901] 1 Ch. 295; *Dodson v. Downey* [1901] 2 Ch. 620; *In re Garwood's Trusts* [1903] 1 Ch. 236.

(s) *Byrne v. Reid* [1902] 2 Ch. 735 C. A.

(t) See the notes on s. 239 under the head "Joint Hindu Family Firm."

(u) *Ganpat v. Annaji* (1898) 23 Bom. 144.

(v) See *Anant v. Gopal* (1894) 19 Bom. 269; *Ramchandra v. Damodhar* (1895) 20 Bom. 407.

253. Sub-s. (7) : Dissolution of firm.—It is often desirable, and in practice it is not uncommon to provide by agreement that the death or retirement of one member from a partnership of several shall not dissolve the contract as between the others.

Sub-s. (8) : Partnership at will : tacit dissolution.—As to the continuation of a partnership for a term after the term has expired, see s. 256.

An intention to dissolve partnership may be inferred from circumstances showing that a partner has in fact abandoned his interest in the concern; but no positive rule can be laid down as to what evidence will suffice. However precarious or speculative the subject matter of a partnership may be, it is a matter of inference to be drawn from the facts of each case whether or no there has been abandonment, or loss of interest by laches (*u*).

Sub-s. (9) : Expulsion.—Power to expel a partner may be conferred by express agreement, but, even more than the ordinary powers of a majority; it must be exercised with regard to the rule of natural justice mentioned under sub-s. (5). Reasonable warning and opportunity of explanation must be given (*x*). An irregular expulsion being wholly inoperative, the person against whom it is directed does not cease to be a partner; he may claim reinstatement in his rights (*y*), and, not being legally deprived of anything, cannot sue for damages (*z*). An option given to one member of the firm to determine the partnership by notice if he is dissatisfied with the business is not analogous to an expulsion clause, but purely discretionary (*a*). Sometimes power is given to expel a partner for specified kinds of misconduct. In case of dispute the Court has to decide according to the ordinary rules of construction whether the facts are within the terms of the power (*b*).

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- (*w*) *Moung Tha Huiin v. Mah Thein* Ex. 190.
Myah (1900) 28 Cal. 53; L. R. 27 (*a*) *Russell v. Russell* (1880) 14 Ch.
 Ind. Ap. 189; *Sudarsanam v. Nara-* D. 471.
sinhulu (1901) 25 Mad. 149, 164. (*b*) "Professional misconduct" in a
 (*x*) *Barnes v. Youngs* [1898] 1 Ch. firm of dentists: *Clifford v. Timms*
 414; 90 R. R. 454. [1908] A. C. 12; "flagrant breach"
 (*y*) *Blisset v. Daniel* (1853) 10 Ha. of duty as a partner includes conviction
 493. for fraud: *Carmichael v. Evans*, [1904]
 (*z*) *Wood v. Wood* (1874) L. R. 9 1 Ch. 486.

Sub-s. (10) : Dissolution by death.—See on sub-s. (7). Obviously A. and B. cannot be presumed to desire their partner C's executors to come into the firm, nor yet to be willing to continue the business in partnership without C. But since this sub-section, like all the preceding ones, must be read with the words "in the absence of any contract to the contrary" at the commencement of the section, partners may agree (as they frequently do) that on the death of any of them his nominee or legal representative shall be entitled to take his place. In the case of a power to nominate a successor on death, it is necessary that there should be "a specific direction in that behalf either in express terms, or, at any rate, by a specific disposal of the deceased partner's interest in the firm." The will of a deceased partner, making a general bequest of his property, does not operate as an exercise of such a power (c).

8s.
253, 254.

Custody of books.—Nothing is said in the present Act about the custody of the partnership books. In England they must be kept at the principal place of business of the firm, and every partner may inspect and copy them : P. A. s. 24, sub-s. (9) (d). Where there is more than one place of business a properly framed partnership agreement will declare in express terms which is to be the principal one and where the books are to be kept. The right of inspection may be exercised by an agent, provided that he is a fit person and undertakes, if required, not to use the knowledge thus obtained for any other purpose than the confidential information of his principals (e).

254.—At the suit of a partner the Court may dissolve

the partnership in the following cases :

When Court may
dissolve partnership.

(1) when a partner becomes of unsound mind :—

(2) when a partner, other than the partner suing, has been adjudicated an insolvent under any law relating to insolvent debtors :

(c) *Bachubai v. Shamji* (1885) 9 Bom. 536, 554.

(d) See too *Greentex v. Greentex* (1847) 1 De G. & Sm. 692: 75 R. R. 251, and form of injunction there.

(e) *Bewan v. Webb* [1901] 2 Ch. 59, 81, C. A. Not only a partner's agent

but the partner himself might at need be restrained from using copies or extracts made in the exercise of a partner's right for purposes hostile or injurious to the interests of his firm : *Trego v. Hunt* [1896] A. C. 7, 26, Lord Davey.

254.

- (3) when a partner, other than the partner suing, has done any act by which the whole interest of such partner is legally transferred to a third person :
- (4) when any partner becomes incapable of performing his part of the partnership contract :
- (5) when a partner, other than the partner suing, is guilty of gross misconduct in the affairs of the partnership or towards his partners :
- (6) when the business of the partnership can only be carried on at a loss.

This section represents with substantial accuracy the established English practice, and P. A. s. 35 has followed it with some little specifying and amplification. In England a partner's bankruptcy works a dissolution without the action of the Court.

Sub-s. (3) : Transfer of partner's share by operation of law.—The share of a partner in partnership business is "saleable property" within the meaning of s. 266 of the Code of Civil Procedure (*f*), and may, therefore, be attached and sold in execution of a decree against him (*g*). Such a case is within the spirit, if not the letter, of the present sub-section.

Sub-s. (5) : "Gross misconduct."—These words are perhaps not the most apt to cover all the circumstances in which "such a state of feeling may arise and exist between the partners as to render it impossible that the partnership can continue with advantage to either." It seems that in such a case either partner may claim a dissolution (*h*). The Indian Courts are not likely to decline jurisdiction ; they might be astute, at need, to bring the facts within sub-s. (6).

Sub-s. (6) : Business carried on at a loss.—When the business of the partnership cannot be carried on except at a loss, the Court may, in its discretion dissolve the partnership before the expiration, of its term. If the trial judge orders a dissolution neither capriciously nor without disregard of legal principles, the exercise of the discretion

(f) Now Code of 1908, s. 60.

(h) Lord Cairns, *Atwood v. Mauds*

(g) *Jagat Chunder v. Iswar Chunder*

(1868) L. R. 3 Ch. at p. 373.

(1893) 20 Cal. 693. *Op.* P. A. s. 23.

is not open to review upon appeal (i). A contract between a partner and his co-partners for remuneration to the former for the management of the partnership business by a commission on the sale, during his lifetime, does not, in the absence of any express agreement to that effect, imply a renunciation of the right of the co-partners to dissolve the partnership if they find that it cannot be carried on except at a loss; nor does it imply an obligation to pay the managing partner compensation in case the partnership is dissolved for that reason (j).

Rescission for fraud.—Like any other contract, a contract of partnership may be rescinded on the ground of fraud or misrepresentation. In England it is expressly provided that the party entitled to rescind is entitled to full reimbursement and indemnity: see P. A. s. 41. This enactment is founded on, and closely follows a decision of Sir E. Fry's, in which the plaintiff, having been induced by fraud to buy a share of a business, claimed rescission and indemnity besides dissolution, and was held "entitled, in respect of the purchase-money which he had paid, to a lien on the surplus of the partnership assets, after satisfying the partnership debts and liabilities," and also to stand in the place of partnership creditors to whom he might have made any payments for debts of the firm (k).

Dissolution of
partnership by pro-
hibition of business.

255.—A partnership is in all cases dissolved by its business being prohibited by law.

This would not apply to the case of part only of a firm's business becoming unlawful; trading with a particular country, for example, might very well be interrupted and forbidden by war while trade with other countries was lawful and within the scope of the partnership. In itself the rule is elementary. *Cp. s. 23.*

Where a partnership carrying on business in British territory is dissolved by one partner becoming an alien enemy, and the British partner continues to carry on the business, the enemy partner is

(i) *Rehmat-Un-Nissa Begam v. appeal from (1871) 8 B. H. C. O. C. Price (1918) L. R. 45 I. A. 61, 42 Bom. 209.*

380. (k) *Mycock v. Bealson* (1879) 13 Ch.

(j) *Counajee v. Lalbhoy* (1876) 1 D. 384.
Bom. 468; L. R. 3 Ind. Ap. 200, in

8s. entitled to share the profits made after dissolution by the use of
255-257. his capital, payment being of course suspended during the war (*l*).

256.—If a partnership entered into for a fixed term be continued after such term has expired, the rights and obligations of the partners will, in the absence of any agreement to the contrary, remains the same as they were at the expiration of the term, so far as such rights and obligations can be applied to a partnership dissolvable at the will of any partner.

Rights and obligations of partners in partnership continued after expiry of term for which it was entered into.

P. A: s. 27, which is slightly different in wording, but to the same effect, adds that continuance of the business without liquidating the partnership affairs is presumed to be a continuance of the partnership. The following provisions have been held applicable to the continuing relations of partners holding on after the term: option for a surviving partner to purchase a deceased partner's share at a fixed valuation (*m*); an arbitration clause (*n*). The following have been held inconsistent with a partnership at will: requirement of notice a certain time before retiring from the partnership (*o*); option to dissolve the partnership, in special circumstances, on special terms (*p*).

257.—Partners are bound to carry on the business of the partnership for the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

A clause to this effect was formerly common in partnership articles, but it added nothing to the duties of partners as established

(*l*) *Hugh Stevenson & Sons v. Featherstonhaugh v. Fenwick*
Aktiengesellschaft für Cartonnagen-Industrie [1918] A. C. 239. (1810) 17 Ves. 307; 11 R. R. 81.
 (*m*) *Coz v. Willoughby* (1880) 13 Ch. 14; 1 De G. J. & S. 409; 137 R. R. 247.
 D. 863.
 (*n*) *Gillet v. Thornton* (1875) L.R. 10 Eq. 599.
 (*o*) *Clark v. Leach* (1862) 32 Beav.

in Courts of Equity. To this head may be referred the right of every partner to have access to the partnership books (separately declared by P. A. s. 52, sub-s. (9)) ; it may be exercised through an agent, free from reasonable objection, on the agent undertaking not to misuse the information he acquires (g). A partner himself must not use extracts from the books to the injury of the firm after he has left it (r).

In a transaction between partners for the sale and purchase of a share in the business, if one of them is better acquainted with the accounts than the other, it is his duty to disclose all material facts ; but the party entitled to such disclosure may elect at any stage to waive his right to further information, even if he knows that there has been some concealment of facts which he has since discovered, and believes that other facts are still concealed (s). In other words, his election to affirm the contract, or to compromise his claim if he does so elect, is as binding as in the case of any other voidable contract.

Account to firm
of benefit derived
from transaction
affecting partner-
ship.

258.—A partner must account to the firm for any benefit derived from a transaction affecting the partnership.

Illustrations.

(a) A., B., and C. are partners in trade. C., without the knowledge of A. and B., obtains for his own sole benefit a lease of the house in which the partnership business is carried on. A. and B. are entitled to participate, if they please, in the benefit of the lease. [*Featherstonhaugh v. Fenwick* (1810) 17 Ves. 298 ; 11 R. R. 77.]

(b) A., B., and C. carry on business together in partnership as merchants trading between Bombay and London. D., a merchant in London, to whom they make their consignments, secretly allows C., a share of the commission which he receives upon such consignments in consideration of C.'s using his influence to obtain the consignments for him. C. is liable to account to the firm for the money so received by him.

“It is clear law that every partner must account to the firm for every benefit derived by him without the consent of his co-partner:

(g) *Byvan v. Webb* [1901] 2 Ch. 59, C. A. The settlement held by the Court to be final was the compromise

(r) *Lord Davey, Trego v. Hunt* [1896] A. C. at p. 26. an action for damages for misrepresentation.

(s) *Law v. Law* [1905] 1 Ch. 140,

- ss. 258, 259. from any transaction concerning the partnership or from any use by him of the partnership property, name, or business connection, (d). This does not make him liable to account for profit made in an independent business, not competing with the firms, in which information he has acquired as a partner has or may have been useful to him, not even if his undertaking any such business is a breach of the partnership articles entitling the other partners to damages or possibly a dissolution (u).

The principle is derived from, or identical with, that which we have already met with in the law of agency (ss. 216, 218, above).

In illustration (a) the result would probably be the same even if A. and B. had previous notice of C.'s intention (v).

259.—If a partner, without the knowledge and consent of the other partners, carries on any business competing or interfering with that of the firm, he must account to the firm for all profits made in such business, and must make compensation to the firm for any loss occasioned thereby.

Obligations, to firm, of partner carrying on competing business.

This is a fundamental rule similar in principle to that of the last section, and their application is not always easily distinguishable. One or more persons may, with knowledge and consent of all parties, be members of two distinct firms carrying on a similar, if not a directly competing, business, as where the two undertakings are a morning and an evening newspaper. In such a case members of firm A. who also belong to firm B. are not entitled, though a majority in A., to use A.'s special information for the purposes of B. (w). There may be an express agreement not to engage in any business whatever other than the firm's irrespective of competition. Breach of such an agreement, however, does not make the partner breaking it liable for an account of profits (x). In fact, an agree-

(t) Lindley, L.J., *Aas v. Benham* M. G. 787, 807; 114 R. R. 336, 346. [1891] 2 Ch. 244, 255.

(u) *Dean v. McDowell* (1878) 8 Ch. S. & St. 124; 24 R. R. 153.

Div. 345; *Aas v. Benham*, last note. (x) Note (u), above.

(v) *Clegg v. Edmondson* (1857) 8 D.

ment so expressed is only equivalent to the more usual form by which the promisor undertakes to give his whole time and attention to the partnership business. Ss.
259, 260.

260.—A continuing guarantee, given either to a firm or to a third person, in respect of the transactions of a firm, is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or in respect of the transactions of which, such guarantee was given.

This section is practically a redrafting of 19 & 20 Vict. c. 9 (Mercantile Law Amendment Act, 1856), s. 4, and has been adopted almost word for word in P. A. s. 18, the original enactment (which was in affirmance of existing law) (y) being repealed by s. 48.

The agreement to the contrary required to displace the effect of this section must be clearly shown. It is not implied in the mere fact that the guarantee is given to a firm whose name has ceased to describe its existing members, and is to secure the balance of a current account (z). Such an intention may be apparent from other circumstances. A bond given to trustees to secure the faithful service of a clerk to an incorporated insurance society having a large number of members, "some of whom might be changed before the wax on the bond was cold," was held enforceable without regard to the identity of the members for the time being, the purpose being clear and the interposition of trustees removing any formal difficulty about parties (a). A case of this kind can hardly occur in modern practice.

The one Indian decision reported on this section is in a plain case. A. becomes surety to the firm of "N. C. Mookerji" for B.'s conduct as cashier to the firm. The constitution of the firm is sub-

(y) There was a corresponding enactment for Scotland, the intention being to make the law of Great Britain uniform beyond a doubt. See per Blackburn, J., in the case next cited.

(z) *Backhouse v. Hall* (1865) 6 B. & S. 507.

(a) *Metcalf v. Bruin* (1810) 12 East, 400; 11 R. R. 432.

- 8s. subsequently changed, and its name is altered to "N. Mookerji & Son."
 260-262. A. is not liable for B.'s defalcations subsequent to the change (b).

261.—The estate of a partner who has died is not, in the absence of an express agreement, liable in respect of any obligation incurred by the firm after his death.

Non-liability of deceased partner's estate for subsequent obligations.

Cp. P. A. s. 36 (3). It is immaterial if the obligation was incurred towards a creditor who believed the deceased partner to be living and a member of the firm (c).

"It may be taken as a general proposition that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners"; but a partner may authorise his executors to continue the business after his death, and may thereby make his whole (d) estate liable to indemnify them for debts contracted in so doing (e). The principles applicable in these cases are really independent of the law of partnership, and even the testator's authority may be dispensed with by the assent of the creditors to the business being carried on (d).

The provisions of s. 263 do not override the express provisions of this section; hence where money is borrowed by surviving partners to pay for and take delivery of goods ordered by the firm in the lifetime of the deceased partner, the estate of the deceased is not liable for the debt. All that the creditor is entitled to is a personal decree against the surviving partner and a decree against the partnership assets in the hands of those partners (f).

262.—Where there are joint debts due from the partnership, and also separate debts due from any partner, the partnership property must be applied in the first

Payment of partnership debts, and of separate debts.

(b) *Neel Comul Mookerjee v. Bipro Dass* (1901) 28 Cal. 597. The only question really argued was whether the defendant was liable on an independent personal guarantee.

(c) *Houlton's Case* in *Devaynes v. Noble, etc.* (1816) 1 Mer. 529, 616; 15 R. R. 151, 169. Nothing in the

English Act affects the authority of this decision: *Friend v. Young* [1897] 2 Ch. 421, 428.

(d) *Dowse v. Gorton* [1891] A. C. 190.

(e) *Lindley*, 710.

(f) *Seshi Ammal v. Vairavan Chettiar* 1918) 35 Mad. L. J. 669.

instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

S. 262

This is an English rule of administration in bankruptcy which was already fixed in the second quarter of the eighteenth century (g). "It has long been settled in bankruptcy that the joint estate is to be applied in payment of the joint debts, and the separate estate in payment of the separate debts, and surplus there may be of either estate being carried over to the other. . . . According to this rule, . . . joint creditors cannot touch the separate estate until after payment in full of the separate debts. They take the surplus only after payment of those debts" (h). The rule is established in all or nearly all common law jurisdictions, and is embodied in the English Bankruptcy Act of 1883 (s. 40); but no one seems to know the original reasons for its adoption. It is generally disapproved on principle as unduly favouring separate at the expense of joint creditors, and it does not agree with mercantile usage or

(g) Lindley, 811.

(h) Turner, L.J., *Lodge v. Prichard* (1863) 1 De G. J. & S. 610, 613, 614; 137 R. R. 316, 317, 318. See further *Ridgway v. Clare* (1854) 19 Beav. 111, 115; 105 R. R. 80, 83. The Master of the Rolls' statement is thus summed up in the head-note:—

"The distinction between joint and separate assets is not restricted to the cases of a distribution under a bankruptcy or insolvency: it applies equally to the case of the administration of assets of deceased partners.

"In the administration of the assets of a deceased partner, where both partners are solvent, there is no distinction made between joint and several creditors; they are all paid, and in taking the partnership accounts, the joint debts

thus paid will be allowed in account by the surviving partner.

"If the estate of the deceased partner be insolvent, and that of the surviving partner solvent, the joint creditors will naturally go against the surviving partner, who will then be a creditor against the separate estate of the insolvent partner for the amount paid by him to the joint creditors beyond his share.

"If both the deceased and surviving partner are insolvent, then the joint creditors must resort, in the first instance, to the joint estate, and can only go against the separate estate of each partner after the claims of his separate creditors have been satisfied.

"If both partners die before administration takes place, the rule is the same."

8s. with the laws of other nations (i). Probably the framers of this
 1, 263. Act thought it better to preserve the certain good, so far as it goes,
 of uniformity with English law than to enact a rule more just in
 itself, but divergent.

The present section is not limited to the case of insolvency, and seems to include by implication the right of every partner, which belongs to the class of equitable (not possessory) liens and is commonly called partners' lien, to have the partnership property duly applied when a dissolution takes place, from whatever cause. This right is separately declared by P. A. s. 39. It is available after dissolution, as between the partners, against one partner who has taken over the assets and business of the firm, but not against former assets in the hands of a purchaser or mortgagee. The continuing partner is bound to apply the remaining assets in paying the partnership debts, but a purchaser from him in the ordinary course of business deals with him as owner, not as partner, and is not accountable for the application of his money (j). If, however, a surviving or continuing partner makes fresh acquisitions of property in the course of carrying on the business after dissolution, the property so acquired is not subject to the claim of the other partners or their executors, and they will not, in the event of his becoming bankrupt, be entitled to dispute the claim of his creditors thereon (k).

Continuance of
 partners' rights and
 obligations after
 dissolution.

263.—After a dissolution of partnership, the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership.

This was no doubt meant to express English law, and does so if it be read with sufficient emphasis on the word "necessary." As declared by P. A. s. 38, the authority of partners continues "so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise." Thus any generally acting partner

(i) Lindley, 815, 816; Pollock, 161. [1906] 2 Ch. 427, C. A.

(j) *Re Langmead's Trustee*, 20 Beav. (k) *Payne v. Hornby* (1858) 25 Beav. 20; 7 D. M. G. 353; *Re Bourne* 280, 286.

may sell or pledge partnership property to satisfy an obligation of the firm incurred before dissolution (*l*). A surviving partner has no power even in the course of winding up to renew a promissory note in the name of the firm so as to bind the estate of the deceased partner. The contrary view (*m*) taken by the High Court of Bombay is, it is submitted, erroneous. But where a partnership is dissolved on the terms of one partner taking over the business and assets, the partner who has taken them accordingly has no authority to bind the outgoing partner by making negotiable instruments in the name of the old firm (*n*).

S. 263.

A retiring partner may give special and larger authority, however, if he thinks fit, and this may rather be expected while the winding up of a business is actively proceeding. Leaving assets in a continuing partner's hands for the purpose of winding up the concern is different from turning over the whole future benefit and responsibility to him as a purchaser (*o*). The executors of a deceased partner are not entitled, on dissolution of the partnership, to join the surviving partners in the winding up, but they have a right to inspect and challenge the accounts (*p*).

Suit by a surviving partner for debts to firm.—The question whether the representatives of a deceased partner are necessary parties to a suit for the recovery of a debt which became due to the firm in his lifetime has been considered under s. 45 (pp. 301, 302 above).

Use of partnership name.—A surviving partner, while he has authority to act for the best interest of the business, is bound not to act in such a manner as to destroy any part of its value. It is quite settled in our modern law that the goodwill (see p. 808 above) is an asset of the firm and does not, as once supposed, "survive" to the continuing partner alone. "If, then, it is not permissible for a surviving partner to appropriate to himself the goodwill of the part-

(*l*) *Butchart v. Dresser* (1853) 4 Ad. 172; 38 R. R. 237.
D. M. G. 542; 102 R. R. 269.

(*o*) *Smith v. Winter* (1838) 4 M. &

(*m*) *Markandrai v. Virendrarai* (1917) W. 454; 51 R. R. 678.

19 Bom. L. R. 837, 842. See s. 201
(*p*) *Shidhappa v. Shivalingappa*
and notes thereto. (1899) 1 Bom. L. R. 42.

(*n*) *Heath v. Sansom* (1832) 4 B. &

8. 263. nership business, it follows that he ought not to do so, and in case of necessity would be restrained by the Court, pending a sale of the goodwill for the benefit of the partnership, from doing any act in excess of his rights which, if not stopped, would enable him to obtain the goodwill or any part of it. For example, though a surviving partner is within his rights in carrying on a similar or rival business, he could, in my opinion, be restrained from carrying on that rival business in the name of the partnership firm so as to lead to the belief that he was carrying on the partnership business, or so as otherwise to appropriate to himself the goodwill of that business" (q). Certainly one partner may be restrained from using the firm-name or the firm's property to do business for his own exclusive profit pending the liquidation of the partnership affairs (r). After dissolution and liquidation of a firm there is no exclusive right to the use of the old name unless it has been so agreed; but it must not be used so as to expose a former partner to liability on the ground of "holding out" (s). Whether there is any substantial risk of that kind is a question of fact in each case.

Duties between continuing and outgoing partners.—Various and often complicated questions have arisen where a retiring or deceased partner's capital has been left in the firm's business without any settlement of accounts. Provision is made for these cases, in accordance with the result of a long series of authorities (t), in P. A. s. 42. If there is no special agreement the outgoing partner or his representatives may claim at his or their option "such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets" (but

(q) *Romer, J., Re David and Matthews* [1899] 1 Ch. 378, 383, where it is further pointed out that certain earlier decisions, apparently to the contrary, are not now to be relied on.

(r) *Turner v. Major* (1862) 3 Giff. 442; 133 R. R. 162.

(s) *Burchell v. Wilde* [1900] 1 Ch. 551, C. A.

(t) The principal decisions are *Brown v. De Tastet* (1821) Jac. 284;

23 R. R. 59; *Crawshaw v. Collins* (1826) 2 Russ. 325; 26 R. R. 83; *Willett v. Blandford* (1841) 1 Ha. 253; 58 R. R. 61, approved in *Simpson v. Chapman* (1853) 4 D. M. & G. at p. 171; 102 R. R. 70; *Wedderburn v. Wedderburn* (1855-6) 22 Beav. 84, 123; 111 R. R. 267, 290; *Turner v. Major* (1862) 3 Giff. 442; 133 R. R. 162; *Vyse v. Foster* (1874) L. R. 7 H. L. 318.

experience is not favourable to this method) or interest at 5 per cent. on the amount of the share (*u*). But the due exercise by the continuing firm of an option (such as is often given by partnership articles) to buy out the share of the late partner excludes any further claim to an account of profits. The existence of such an option has no effect if it is not exercised in accordance with its terms. Further and more complicated questions may arise if a continuing partner is personally responsible as executor or trustee to the persons beneficially interested in the late partner's share; his liability in that capacity must be carefully distinguished from that which he may incur simply as a partner. Cases of this kind can hardly occur except where a deceased partner's capital has been disposed of by a will of the English type (*v*). The principle is "that a trustee or executor who uses trust-money in trade must account for the profits which he makes by that use of it" (*w*).

8s.
263, 264

Apart from any such special relation as just mentioned, surviving or continuing partners are not, in the inaccurate phrase which at one time was current, trustees for an outgoing partner or a deceased partner's representatives. Whatever is due on that account is a debt and nothing else than an ordinary debt, "a due accruing at the date of the dissolution or death"; so P. A. s. 43 expressly declares, in accordance with English law as settled more than a generation ago; and as such it is subject to the ordinary law of limitation of actions (*x*).

264.—Persons dealing with a firm will not be affected by a dissolution of which no public notice has been given, unless they themselves had notice of such dissolution.

What notice required.—This section looks, on the face of it, as if it had been intended to simplify the English rule and abolish its distinction between old and new customers of the firm; but authoritative interpretation, so far as it has gone, is otherwise.

(*u*) *Ahmed Musaji v. Hashim Ebrahim* (1915) L. R. 42 I. A. 91, 42 Cal. 914. See Indian Trusts Act, 1882, s. 88, ill. (f).
 (*v*) *Vyse v. Foster*, note (f) above is the leading authority. Cp. the
 Trusts Act II of 1882, s. 88, illust. b and f.
 (*w*) L. R. 7 H. L. at p. 329.
 (*x*) *Knox v. Gye* (1872) L. R. 5 H. L. 658, see per Lord Westbury at p. 675.

S. 264. The English law requires that the old customers, who are known to the firm as having dealt with it, shall have actual notice, which is commonly given by circular. But, as regards persons who have not dealt with the firm (or, in other words, the general public), it is impossible in a large community to give any specific notice; and therefore, as regards them, the most effectual public notice is all that can be required. In England notice published in the *London Gazette* is sufficient (P. A. s. 36). It is doubtful, however, whether in India the publication of a notice of dissolution in the *Government Gazette* is always sufficient public notice for the present purpose. As far back as the year 1882 the High Court of Calcutta was confronted with the problem of ascertaining the true meaning of this section (y). It was contended in that case that the meaning of the section was that persons dealing with a firm, whether old or new customers, were to be bound, in the absence of actual notice to them, by public notice of the dissolution, and that the distinction obtaining in English law as to the character of the notice in the case of old and new customers was done away with. The Court, however, stated that, if it was the intention to introduce such a serious change into the law, the language used would have been much more clear, and it was held that, no express notice of the retirement of the defendant having been given to the plaintiff, who was an old customer of the firm, the defendant was liable to him, though the notice of dissolution was published in four local papers. As to what is public notice, the Court stated that it must depend upon circumstances, upon the locality, and whether there are any, and what, newspapers in circulation there, or upon what are the usual means of giving public notice in the neighbourhood (z).

“Persons” dealing with a firm.—This expression means “persons who have been in the habit of dealing with and at the time of the dissolution were contemplating further dealing with the firm, on the faith of the firm remaining the same as that with which their dealings commenced” (a).

Dormant partner.—According to the English law if a dormant partner (i.e., one not known to be a partner) retires from the

(y) *Chundee Churn v. Eduljee* (1882) 8 Cal. 678.

(a) *Gorio v. Vallabhdas* (1915) 17 Bom. L. R. 762, 765, per Beaman, J.

(z) 8 Cal. at p. 684.

firm, though it be without notice to the customers of the firm, he cannot be held liable for partnership debts contracted after his retirement, the reason being that he never was known to be a partner and no notice therefore was necessary. The same view has been taken by the Indian Courts in a large number of cases (*b*). In a recent Bombay case, Beaman, J., expressed the opinion that the present section applied to a dormant partner as well, and that if no notice of dissolution was given, he would be liable in respect of obligations incurred after his retirement (*c*). We cannot agree with this, for the only ground on which a retired partner can be liable is that credit was given to him as an ostensible partner.

88.
264, 265.

265.—Where a partner is entitled to claim a dissolution of partnership, or where a partnership has terminated, the Court may, in the absence of any contract to the contrary, wind up the business of the partnership, provide for the payment of his debts, and distribute the surplus according to the shares of the partners respectively (*d*).

Winding up by Court on dissolution or after termination.

Amendment.—This section is printed as amended by the Indian Contract Act Amendment Act IV of 1886, s. 1.

Old Section.—The section as it originally stood ran as follows :—

“In the absence of any contract to the contrary, after the termination of a partnership, each partner or his representatives may apply to the Court to wind up the business of the firm, to provide for the payment of its debts, and to distribute the surplus according to the shares of partners respectively.

“*Explanation.*—The Court in this section means a Court not inferior to the Court of a District Judge within the local limits of whose jurisdiction the place or principal place of business of the firm is situated.”

(*b*) *Ramasami v. Kolar Bibi* (1886) 9 L. R. 366.
Mad. 492; *Hashmat Ali v. Lachmi* (*c*) *Gorio v. Vallabhdas* (1915) 17
Narain (1908) *Punj. Rec.* no. 75; *Bom. L. R.* 762.
Gravers v. Parshotam (1903) 5 *Bom.* (*d*) *Cp. P. A.* s. 39.

8. 265. Under the old section it was held, on the one hand, that the section was only ancillary to the ordinary suit for winding up the affairs of a partnership, and did not take away the ordinary right of suit in any civil Court having jurisdiction to have the accounts of the partnership taken (*e*). On the other hand, it was maintained in several cases that the proceedings under that section could only be instituted in the Court of the District Judge and not any Court subordinate thereto (*f*). Further it was necessary under the old section that there should be a previous dissolution of partnership in order to give jurisdiction to the Court to wind up the partnership (*g*). This, however, is not necessary under the present section, and a suit may be brought for dissolution of partnership.

Suit for account.—No suit will lie, as a general rule, by one partner against another for partnership accounts without praying a dissolution (*h*). Such was the rule of English Courts of Equity. And when a suit for account is brought all questions arising between the partners out of the partnership transaction should be disposed of in that suit (*i*).

No suit can be maintained by one partner against another in respect of any transaction which forms an item of the partnership account, for such a suit would, from its very nature, involve the taking of the whole partnership account, and this can only be done in a suit for an account (*j*). Thus one partner cannot sue for money lent by him to a firm of which he is a member; for the advance is but an item in the partnership account (*k*). But the suit will lie if it is

(*e*) *Javali Ramasami v. Satham-bakam* (1877) 1 Mad. 340; *Luchman*

Lall v. Ram Lall (1880) 6 Cal. 521; *Hasha v. Ragho* (1881) 6 Bom. 165.

(*f*) *Ramayya v. Chandra Sekara*

(1882) 5 Mad. 256; *Prosad Doss v.*

Russick Lall (1881) 7 Cal. 157; *Ram*

Chunder v. Manick Chunder (1881) 7

Cal. 428; *Juggut Chunder v. Rada*

Nath (1884) 10 Cal. 669.

(*g*) *Sorabji v. Dulabhbhai* (1880) 5 Bom. 65.

(*h*) *Golla Nagabhushanam v. Kana-*

kala (1864) 2 M. H. C. 28; *Kassa Mal*

v. Gopi (1886) 9 All. 120; *Damodara*

v. Subraya (1917) 33 Mad. L. J. 509.

See also *Lindley*, 592, 595-597.

(*i*) *Lalbhai v. Kavaji* (1871) 8 B.

H. C. O. C. 209; *Keshav v. Rayappa*

(1875) 12 B. H. C. 165.

(*j*) *Bhagtidas v. Oliver* (1872) 9 B.

H. C. 418.

(*k*) *Rustomji v. Sheth Purshotamdas*

(1901) 25 Bom. 606. Nor can one partner

sue another for money received by

the latter on behalf of the firm, but not

accounted for by him to the firm:

Bhut Nath Das v. Girish Chandra

(1907) 11 C. W. N. 311.

brought on a transaction which does not involve a general account of all the partnership dealings. Thus one partner can sue his co-partners for contribution in respect of moneys borrowed by him under an express agreement with them for the purposes of the partnership without also asking for a general account (l). Similarly "when two partners borrow from a bank on their joint promissory note, and apply the money borrowed to the partnership concern, and one of the partners is compelled to pay more than his share of the debt, the transactions have been considered to be separate and altogether *dehors* the partnership, and as such capable of sustaining an action for contribution" (m). On the same principle if partners borrow money from a stranger for starting the partnership business, and a decree is obtained by the creditor against the partners and executed against one of them only for the full amount, he is entitled to contribution from his co-partners (n). And one partner may likewise sue another for advances made by him not to the partnership concern, but to the other partner in respect of what he is to contribute to the joint capital (o). Similarly, a suit is maintainable by one partner upon a *promissory note* given to him by the other partners in respect of an advance made by him to the firm, and it is no answer to such a suit that if the general accounts of the partnership were taken, nothing would be found due to him (p). Upon the same principle if A. and B. enter into a partnership under an agreement that the whole capital should be brought in by A. and that B. should hand over to A. all moneys received by him in the course of the partnership business irrespective of the state of the general account, A. can maintain a suit against B. for moneys received by B. but not handed over to A. (q). But where an individual is a common partner in two firms, no action can be brought by one firm against the other upon any transaction between them so long as that individual continues to be a common partner. S. 265.

(l) *Durga v. Raghu* (1898) 26 Cal.

(o) 25 Bom. 606, *supra*.

54.

(p) *Vallam Kondu v. Malupeddi*

(m) *Subbarayudu v. Adinarayudu*

(1908) 31 Mad. 343, distinguishing

1894) 18 Mad. 134, 135; *Dayal v.*

Rustomji v. Sheth Purshotamdas (1901)

Khataw (1875) 12 B. H. C. 97, 107;

25 Bom. 606. See also *Ramnath v.*

Durga Prosonno Bose v. Raghu Nath

Pilamber (1916) 43 Cal. 733, 740-741.

Dasa (1898) 26 Cal. 254.

(q) *Karri Venkata Reddi v. Kollu*

(s) *Labau Sardar v. Choyen* (1915)

Narasayya (1908) 32 Mad. 76.

9 Cal. W. N. 768.

- S. 265. This doctrine, however, does not rest upon any principles of the law of partnership, but is founded on the elementary rule of procedure that the same individual, even in different capacities, cannot be both a plaintiff and a defendant to one and the same action (*r*).

A partner whose remedy against his co-partner for a general account is barred by limitation can recover his share of a particular item of assets received after the dissolution of the partnership. But it is open to the defendant in such a suit to ask the Court to take accounts with a view to showing that the plaintiff had received more than his share in the partnership assets (*s*). Similarly a partner who after the dissolution of the partnership has been compelled to pay a debt due by the partnership can maintain a suit for contribution against his co-partners, even though a suit for a general account is barred by limitation (*t*).

Appointment of receiver.—In England the effect of appointing a receiver is, to the extent of the authority delegated to him by the Court, to exclude every one else from exercising the authority of a partner, whether usual or specially regulated by agreement; and if he is also appointed manager, the whole control of the business is transferred to him, subject to the directions of the Court, whose officer he is. Hence a receiver is seldom appointed when a dissolution is not contemplated (*u*), though it can be done (*v*), and a manager never (*w*). Where the partnership is already dissolved, it is almost a matter of course, though not a matter of right, to appoint a receiver at the instance of a partner (*x*). Where one or more partners are bankrupt, it is the practice of the Court to appoint the solvent acting partner receiver and manager, requiring security in its discretion. It is not considered desirable, as a rule, to separate the offices of receiver and manager, though the Court has power to do so (*y*). On the other hand, where the partnership is not yet dissolved, the appointment of

(*r*) 25 Bom. at p. 612. See now the Code of Civil Procedure, 1908, O. 30, r. 9.

(*s*) *Merwanji v. Rustonji* (1882) 6 Bom. 628; *Sokkanadtha v. Sokkanadtha* (1904) 28 Mad. 344; *Thiruvenguda v. Sadagopa* (1910) 34 Mad. 112.

(*t*) *Sadhu Narayana v. Ramaswami Aiyangar* (1908) 32 Mad. 263.

(*u*) See *Hall v. Hall*, 3 Mac. & G.

79; 87 R. R. 15.

(*v*) *Const v. Harris* (1823) T. & R. 496, 517; 21 R. R. 108, 125, 135.

(*w*) Lindley, 611.

(*x*) *Pini v. Roncoroni* [1892] 1 Ch. 633.

(*y*) *Collins v. Barker* [1893] 1 Ch. 578.

a receiver is not an ordinary incident of an action for dissolution. "The due winding up of the affairs of the concern must be endangered to induce the Court to appoint a receiver of its assets" (z). There must be fraud or gross misconduct of some kind (a), or wilful denial of the complaining partner's rights (b), or persistence, under colour of right, in conduct endangering the assets (c). In such cases the Court will act either before or after a dissolution. "As, in the ordinary course of trade, if any of the partners seek to exclude another from taking that part in the concern which he is entitled to take, the Court will grant a receiver, so in the course of winding up the affairs after the determination of the partnership the Court, if necessary, interposes on the same principle" (d). The jurisdiction "is founded on the common right of persons who are interested in property which is in danger to apply for its protection" (e), and even a doubt as to the legality of the partnership or its objects will not hinder the Court from preserving the property in the meantime (f), or enable a defendant to use such a technical objection to deny all relief to the plaintiff (g). The appointment of a receiver does not, of course, conclude any ultimate question.

A receiver and manager is an officer of the Court, and does not succeed to the personal fiduciary relations of partners. Accordingly, if he becomes entitled to an indemnity for expenses of management, he can look only to the assets under the control of the Court (h). He will not be restrained from dealing on his own account with customers of the firm, or competing with a purchaser of the business, doing nothing inconsistent with his employment while it lasts (i). A partner

(z) Lindley, 617.

(a) *E.g., Smith v. Joyce* (1841) 4 Beav. 503; 55 R. R. 149.(b) *Hale v. Hale* (1841) 4 Beav. 369; 55 R. R. 107.(c) *Madgwick v. Wimple* (1843) 6 Beav. 495; 63 R. R. 155, where surviving partners insisted (apparently in good faith, on their construction of the articles) on keeping a deceased partner's assets in the business.(d) Lord Eldon, *Wilson v. Greenwood*

(1818) 1 Sw. 471, 481; 18 R. R. 118, 123.

(e) Knight Bruce, L.J., *Evans v. Coventry* (1854) 5 D. M. G. 911, 916, 104 R. R. 343, 347.(f) *Sheppard v. Oxenford* (1855) 1 K. & J. 491; 103 R. R. 203.(g) *Hale v. Hale*, note (b), above.(h) *Boehm v. Goodall* [1911] 1 Ch. 155.(i) *Re Irish* (1888) 40 Ch. D. 49.

265. appointed receiver by the Court on the usual terms is entitled as such to his remuneration and costs out of the assets in his hands although as a partner he is in debt to the firm and unable to pay (j). His position as an officer of the Court is independent of the state of his accounts as a partner with the firm.

It is not thought useful to enter on administrative details of English practice, which are probably not applicable and certainly not binding in Indian Courts.

Receivers in Indian practice.—The power of Indian Courts to appoint a receiver is now defined by O. 40, r. 1, of the Code of Civil Procedure, 1908. Under that rule a receiver may be appointed “where it appears to the Court to be just and convenient.” The High Court here in their original jurisdiction possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act (k). And when the assets of a partnership are in the hands of a receiver, they cannot be attached by a creditor of the firm without the leave of the Court first obtained, as the assets in such a case are in the hands of the Court through its officer, the receiver; and such leave will not be granted except on such terms as will ensure equality between the creditors (l). The Procedure Code of 1908 (O. 40) assimilates Indian to English practice.

Limitation period for a suit for dissolution.—The period of limitation for a suit for an account and a share of the profits of a dissolved partnership is three years from the date of dissolution (m); and the period is the same even if the instrument of partnership is registered (n). But although a suit to take partnership accounts may be time-barred, a suit may be brought by the representative of a deceased partner against the surviving partner of a firm to recover a share in

(j) *Davy v. Scarth* [1906] 1 Ch. 55.

(k) *Jaikisundas v. Zenabai* (1890) 14 Bom. 431, 434.

(l) *Kahn v. Alli Mahomed* (1892) 16 Bom. 577; *Shidlingappa v. Shankappa* (1903) 28 Bom. 176.

(m) Limitation Act, 1908, Sched. I. art. 106. See *Sudarsanam v. Narasimhulu* (1901) 25 Mad. 149.

(n) *Vairavan v. Ponnayya*, (1898) 22 Mad. 14.

the assets realised by the surviving partner in respect of a partnership transaction within the period of limitation (o).

Sa.
265, 266

Cost in a suit for dissolution.—Under ordinary circumstances, the costs of a partnership suit should be paid out of the assets of the partnership, or, in default of assets, by the partners in proportion to their respective shares, unless any partner denies the fact of a partnership, or opposes obstacles to the taking of the accounts, and so renders a suit necessary, when he is usually made to pay the costs up to the hearing (p).

Form of plaint in a suit for dissolution.—See for former practice Civil Procedure Code, 1882, Sched. IV., No. 113; as to forms of decrees, see Nos. 132 and 133 (q); and now Civil Procedure Code, 1908, Sched. I., App. A, No. 49, as to form of plaint; Sched. I., App. D, Nos. 21 and 22, as to forms of decrees.

Limited liability
partnerships, incor-
porated partnerships
and joint-stock
companies.

266.—Extraordinary partnerships, such as partnerships with limited liability, incorporated partnerships and joint-stock companies, shall be regulated by the law for the time being in force relating thereto.

Cp. P. A. s. 1, sub-s. (2). The broad difference in principle between ordinary and extraordinary partnerships is that the former are founded on the mutual confidence of the members, while the latter are composed of a fluctuating number of individuals who put their trust, not in one another, but in a governing body—board of directors, council, or however otherwise named—appointed under the statutory or voluntary constitution of the society.

The law relating to extraordinary partnerships is now contained in the Indian Companies Act VII of 1913 and other special enactments under which companies created for various express purposes have been incorporated.

(o) *Merwanji v. Rustomji* (1882) 6 Bom. 628, 635; *Dagat v. Khatau* (1875) 12 B. H. C. 97, 106; *Durga v. Raghu* (1898) 26 Cal. 254, 258, 259, following *Knox v. Gye* (1872) L. R. 5 H. L. 656.

(p) *Ram Chunder v. Manick Chunder* (1881) 7 Cal. 428.

(q) *Thirukumaresan v. Subbaraya* (1895) 20 Mad. 313.

chedule.

SCHEDULE.

[NOTE.—This Schedule has been repealed by the Repealing and Amending 1914.]

ENACTMENTS REPEALED.

Statutes.

| No. and year of Statute. | Title. | Extent of Repeal. |
|--------------------------------|--|------------------------------|
| Stat. 29 Car. II. c. 3 (r). | An Act for prevention of frauds and perjuries. | Sections 1, 2, 3, 4, and 17. |
| Stat. 11 & 12 Vict. c. 21 (s). | To consolidate and amend the law relating to insolvent debtors in India. | Section 42. |

Acts.

| No. and Year of Act. | Title. | Extent of Repeal. |
|----------------------|--|-------------------|
| Act XIII of 1840. | An Act for the amendment of the law regarding factors by extending to the territories of the East India Company, in cases governed by English law, the provisions of the stat. 4 Geo. IV. c. 83 as altered and amended by the stat. 6 Geo. IV. c. 94. | The whole. |
| Act XIV of 1840. | An Act for rendering a written memorandum necessary to the validity of certain promises and engagements by extending to the territories of the East India Company, in cases governed by English law, the provisions of the stat. 9 Geo. IV. c. 14. | The whole. |
| Act XX of 1844. | An Act to amend the law relating to advances <i>bond fide</i> made to agents entrusted with goods by extending to the territories of the East India Company, in cases governed by English law, the provisions of the stat. 5 & 6 Vict. c. 39 as altered by this Act. | The whole. |
| Act XXI of 1848. | An Act for avoiding wagers | The whole. |
| Act V of 1866 (t). | An Act to provide a summary procedure on bills of exchange, and to amend in certain respects the commercial law of British India. | Sections 9 and 10 |
| Act XV of 1866. | An Act to amend the law of partnership in India. | The whole. |
| Act VIII of 1867. | An Act to amend the law relating to horse-racing in India. | The whole. |

(r) Short title, "The Statute of Frauds." See the Short titles Act, 1896 (59 & 60 Vict. c. 14).

(s) The Indian Insolvency Act, 1848.

(t) Short title, "The Policies of Insurance (Marine and Fire) Assignment Act, 1866. See the Indian Short Titles Act XIV of 1897.

THE SPECIFIC RELIEF ACT, 1877

(ACT No. I OF 1877).

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SCHEDULE.

[ENACTMENTS REPEALED.]

Repealed.

INTRODUCTORY.

Position of Specific Relief in English Procedure.

Specific relief, as a form of judicial redress, belongs to the law of Procedure, and, in a body of written law arranged according to the natural affinities of the subject-matter, would find its place as a distinct Part or other division of the Civil Procedure Code. This has not happened in India because in England, some centuries ago, the King's ordinary Civil Courts of law had in general* no other instrument of coercion than distraint on property (though by a series of statutes, many of them early, imprisonment was authorized in aid of the preliminary stages of process; hence the so-called imprisonment for debt which makes a large figure in English prose fiction down to the middle of the nineteenth century). Payment of money was the only satisfaction the suitor could obtain from the Court of Common Pleas, or other Courts which shared or imitated its jurisdiction, in the regular course of justice. Therefore in many cases where money compensation, even if available, was not an adequate satisfaction, the King's justice was in default. It is now familiar learning to all student of legal history that in the early stages of judicial institutions we constantly find the power of Courts to enforce decisions or even to compel the appearance of parties rudimentary if not wholly wanting. There is therefore nothing to be surprised at in the limited scope of common law

* The earlier medieval actions for the recovery of land were practically obsolete after the Restoration at latest: the action of ejectment which took their place has a peculiar history: the action of detinue professed by the

form of the judgment to give specific relief, with the value of the goods and damages as an alternative, but specific delivery could not be enforced. None of these actions, it will be observed, was founded on contract.

remedies in the Middle Ages. The question why it was not enlarged until the latter part of the nineteenth century has its interest; an interest, however, not material for any practical purpose in British India. The reader may take it as a fact that down to the eighteenth century any such proposal, at any rate coming from official quarters, would have been looked on with suspicion. Meanwhile the Chancellor, exercising the King's reserved power of doing justice in an extraordinary way where the ordinary means failed, had undertaken to make the defect good. The Chancellor's justice, in a proper case, would compel a man actually to perform what he had undertaken, not merely pay damages for breaking his promise. Disobedience to the Chancellor's order was contempt of the King, a personal offence punishable by imprisonment until the command, in theory a special royal command, was obeyed. Such was the sanction of all equitable jurisdiction. A very obstinate party might choose to remain in prison rather than execute a conveyance, and sometimes did. Only in quite recent times have the Courts acquired power to do, without any concurrence of a party in default, that which he ought to have done.

Hence were derived both the strength and the weakness of Courts of Equity. They could do much that a court of common law could not do; but they had to justify their action on the ground that the suitor showed some special cause for seeking a kind of relief which was originally conceived as extraordinary. This was especially so in cases where the plaintiff had a legal right, a right for which the common law provided some remedy, but the common-law was inadequate, in the sense of not being fitted to do full justice in the case. The doctrine and practice of Specific Performance belong to this class (see more on Ch. II of the Act).

In consulting English authorities it must be remembered that as courts of common law could not give specific

relief in their ordinary civil jurisdiction till after the middle of the nineteenth century, so courts of equity had no power to award damages.* Accordingly a plaintiff who sought specific relief might not claim damages in the alternative; if he failed, his only remedy was to commence an action in the appropriate common-law jurisdiction. "He may make what he can of it at law" was a current phrase. Attention to this peculiarity will often explain the practical bearing of arguments that otherwise might seem obscure.

* Sometimes they contrived to go near it: Fry on Specific Performance, § 1209.

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Sale of Goods Act, 1893.

56 & 57 VICT. c. 71.

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15. Sale by sample.

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SCHEDULE.

An Act for codifying the Law relating to the Sale of Goods. [20th February, 1894.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1.—(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2.—Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3.—Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4.—(1) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually received the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4) The provisions of this section do not apply to Scotland.

Subject Matter of Contract.

5.—(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6.—Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7.—Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

The Price.

8.—(1) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9.—(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

Conditions and Warranties.

10.—(1) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2) In a contract of sale "month" means *prima facie* calendar month.

When agreement to be treated as warranty. 11.—(1) In England or Ireland—

(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(b) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any conditions to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

Implied undertaking as to title, etc. there is—

12.—In a contract of sale, unless the circumstances of the contract are such as to show a different intention,

- (1) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :
- (2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :
- (3) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made.

13.—Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description ; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14.—Subject to the provisions of this Act and of any statute in that behalf, there are no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :—

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :
- (2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality ; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :
- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

Sale by Sample.

15.—(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

- (2) In the case of a contract for sale by sample—
 - (a) There is an implied condition that the bulk shall correspond with the sample in quality ;
 - (b) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :
- (3) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

Transfer of Property as between Seller and Buyer.

16.—Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17.—(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18.—Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4.—When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer:—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5.—(1) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19.—(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller reserves the right of disposal, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee or custodian for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal.

(3) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20.—Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Risk *prima facie* passes with property.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

Transfer of Title.

21.—(1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

Sale by person not the owner.

(2) Provided also that nothing in this Act shall affect—

(a) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof:

(b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a Court of competent jurisdiction.

22.—(1) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

Market overt.

(2) Nothing in this section shall affect the law relating to the sale of horses.

(3) The provisions of this section do not apply to Scotland.

23.—When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Sale under voidable title.

24.—(1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen reverts in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

Reverting of property in stolen goods on conviction of offender.

(2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3) The provisions of this section do not apply to Scotland.

25.—(1) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

Seller or buyer in possession after sale.

(2) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3) In this section the term "mercantile agent" has the same meaning as in the Factors Acts.

26.—(1) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27.—It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28.—Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29.—(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf: provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30.—(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31.—(1) Unless otherwise agreed, the buyer of goods is not bound to accept instalment deliveries. delivery thereof by instalments.

(2) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32.—(1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *prima facie* deemed to be a delivery of the goods to the buyer.

(2) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33.—Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35.—The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36.—Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37.—When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.

Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

Unpaid seller defined. 38.—(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

- (a) When the whole of the price has not been paid or tendered;
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignee or agent who has himself paid, or is directly responsible for, the price.

39.—(1) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law—

Unpaid seller's rights.

- (a) A lien on the goods or right to retain them for the price while he is in possession of them;
- (b) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them;
- (c) A right of resale as limited by this Act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transitu where the property has passed to the buyer.

40.—In Scotland a seller of goods may attach the same while in his own hand or possession by arrestment or pouding; and such arrestment or pouding shall have the same operation and effect in a competition or otherwise as an arrestment or pouding by a third party.

Attachment by seller in Scotland.

Unpaid Seller's Lien.

41.—(1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:—

Seller's lien.

- (a) Where the goods have been sold without any stipulation as to credit;
- (b) Where the goods have been sold on credit, but the term of credit has expired;
- (c) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodian for the buyer.

42.—Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

Part delivery.

43.—(1) The unpaid seller of goods loses his lien or right of retention thereon—

Termination of lien.

- (a) When he delivers the goods to a carrier or other bailee or custodian for the purpose of transmission to the buyer without reserving the right of disposal of the goods;
- (b) When the buyer or his agent lawfully obtains possession of the goods;
- (c) By waiver thereof.

(2) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in transitu.

44.—Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Right of stoppage in transitu.

45.—(1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodian for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodian.

Duration of transit.

(2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodian acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodian for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodian continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6) Where the carrier or other bailee or custodian wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped in transitu, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46.—(1) The unpaid seller may exercise his right of stoppage in transitu either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodian in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

How stoppage in transitu is effected.

(2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodian in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller.

Re-sale by Buyer or Seller.

47.—Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage in transitu is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Effect of sub-sale or pledge by buyer.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage in transitu is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage in transitu can only be exercised subject to the rights of the transferee.

48.—(1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage in transitu.

(2) Where an unpaid seller who has exercised his right of lien or retention or stoppage in transitu re-sells the goods, the buyer acquires a good title thereto as against the original buyer.

(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49.—(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50.—(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of refusal to accept.

Remedies of the Buyer.

51.—(1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52.—In any action for breach of contract to deliver specific or ascertained goods the Court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judge.

ment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the Court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53.—(1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

- (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
- (h) maintain an action against the seller for damages for the breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54.—Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

55.—Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

Exclusion of implied terms and conditions.

Reasonable time a question of fact.

Rights, &c., enforceable by action.

Auction sales.

56.—Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57.—Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58.—In the case of a sale by auction—

- (1) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale;
- (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid;
- (3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer.
- (4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59.—In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the Court before which the action depends, to consign or pay into Court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60.—The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61.—(1) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62.—(1) In this Act, unless the context or subject matter otherwise requires,—

- “Action” includes counterclaim and set off, and in Scotland condensation and claim and compensation;
- “Bailee” in Scotland includes custodian;
- “Buyer” means a person who buys or agrees to buy goods;
- “Contract of sale” includes an agreement to sell as well as a sale;
- “Defendant” includes in Scotland defender, respondent, and claimant in a multiplepoinding;
- “Delivery” means voluntary transfer of possession from one person to another;
- “Document of title to goods” has the same meaning as it has in the Factors Acts;

52 & 53 Vict. c. 43,
53 & 54 Vict. c. 46.

“Factors Acts” mean the Factors Act, 1880, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same;

- “Fault” means wrongful act or default;
- “Future goods” means goods to be manufactured or acquired by the seller after the making of the contract of sale;
- “Goods” includes all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;
- “Lien” in Scotland includes right of retention;
- “Plaintiff” includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counterclaiming;
- “Property” means the general property in goods, and not merely a special property;
- “Quality of goods” includes their state or condition;
- “Sale” includes a bargain and sale as well as a sale and delivery;

994p CH. 71.] SALE OF GOODS ACT, 1893. [56 & 57. VICT.

"Seller" means a person who sells or agrees to sell goods:

"Specific goods" means goods identified and agreed upon at the time a contract of sale is made:

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

Commencement.

63.—This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Short title.

64.—This Act may be cited as the Sale of Goods Act, 1893.

Section 60.

SCHEDULE.

This schedule is to be read as referring to the revised edition of the statutes prepared under the direction of the Statute Law Committee.

ENACTMENTS REPEALED.

| Session and Chapter. | Title of Act and Extent of Repeal. |
|------------------------|---|
| 1 Jac. 1, c. 21 .. | An Act against brokers. The whole Act. |
| 29 Cha. 2, c. 3 .. | An Act for the prevention of frauds and perjuries. In part; that is to say, sections fifteen and sixteen (a). |
| 9 Geo. 4, c. 14 .. | An Act for rendering a written memorandum necessary to the validity of certain promises and engagements. In part; that is to say, section seven. |
| 19 & 20 Vict. c. 60 .. | The Mercantile Law Amendment (Scotland) Act, 1856. In part; that is to say, sections one, two, three, four and five. |
| 19 & 20 Vict. c. 97.. | The Mercantile Law Amendment Act, 1856. In part; that is to say, sections one and two. |

(a) Commonly cited as sections sixteen and seventeen.

PARTNERSHIP ACT, 1890.

53 & 54 VICT. C. 39.

ARRANGEMENT OF SECTIONS.

Nature of Partnership.

Section.

1. Definition of partnership.
2. Rules for determining existence of partnership.
3. Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.
4. Meaning of firm.

Relations of Partners to persons dealing with them.

5. Power of partner to bind the firm.
6. Partners bound by acts on behalf of firm.
7. Partner using credit of firm for private purposes.
8. Effect of notice that firm will not be bound by acts of partner.
9. Liability of partners.
10. Liability of the firm for wrongs.
11. Misapplication of money or property received for or in custody of the firm.
12. Liability for wrongs joint and several.
13. Improper employment of trust-property for partnership purposes.
14. Persons liable by "holding out."
15. Admissions and representations of partners.
16. Notice to acting partner to be notice to the firm.
17. Liabilities of incoming and outgoing partners.
18. Revocation of continuing guaranty by change in firm.

Relations of Partners to one another.

19. Variation by consent of terms of partnership.
20. Partnership property.
21. Property bought with partnership money.
22. Conversion into personal estate of land held as partnership property.
23. Procedure against partnership property for a partner's separate judgment debt.
24. Rules as to interests and duties of partners subject to special agreement.
25. Expulsion of partner.
26. Retirement from partnership at will.
27. Where partnership for term is continued over, continuance on old terms presumed.
28. Duty of partners to render accounts, &c.
29. Accountability of partners for private profits.
30. Duty of partner not to compete with firm.
31. Rights of assignee of share in partnership.

Dissolution of Partnership, and its consequences.

32. Dissolution by expiration or notice.
33. Dissolution by bankruptcy, death, or charge.
34. Dissolution by illegality of partnership.
35. Dissolution by the Court.
36. Rights of persons dealing with firm against apparent members of firm.
37. Right of partners to notify dissolution.
38. Continuing authority of partners for purposes of winding up.
39. Rights of partners as to application of partnership property.
40. Apportionment of premium where partnership prematurely dissolved.
41. Rights where partnership dissolved for fraud or misrepresentation.
42. Rights of outgoing partner in certain cases to share profits made after dissolution.
43. Retiring or deceased partner's share to be a debt.
44. Rule for distribution of assets on final settlement of accounts.

Supplemental.

45. Definitions of "Court" and "business."
46. Saving for rules of equity and common law.
47. Provision as to bankruptcy in Scotland.
48. Repeal.
49. Commencement of Act.
50. Short title.

SCHEDULE.

An Act to declare and amend the Law of Partnership.

[14th August, 1890.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Nature of Partnership.

1.—(1) Partnership is the relation which subsists between persons carrying on a business in common with a view of profit.

(2) But the relation between members of any company or association which is—

(a) Registered as a company under the Companies Act, 1862, or any other Act of Parliament for the time being in force and relating to the registration of joint stock companies; or

(b) Formed or incorporated by or in pursuance of any other Act of Parliament or letters patent, or Royal Charter; or

(c) A company engaged in working mines within and subject to the jurisdiction of the Stannaries:

is not a partnership within the meaning of this Act.

Rules for determining existence of partnership.

2.—In determining whether a partnership does or does not exist, regard shall be had to the following rules:

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

- (2) The sharing of gross returns does not of itself create a partnership, whether the person sharing such returns have or have not a joint or common right of interest in any property from which or from the use of which the returns are derived.
- (3) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

- (a) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;
- (b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;
- (c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;
- (d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto;
- (e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

3.—In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover any thing in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower or buyer for valuable consideration in money or money's worth have been satisfied.

Postponement of rights of person lending or selling in consideration of share of profits in case of insolvency.

4.—(1) Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

Meaning of firm.

(2) In Scotland a firm is a legal person distinct from the partners of whom it is composed, but an individual partner may be charged on a decree or diligence directed against the firm, and on payment of the debts is entitled to relief *pro rata* from the firm and its other members.

Relations of Partners to persons dealing with them.

5.—Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority or does not know or believe him to be a partner.

Power of partner to bind the firm.

6.—An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised whether a partner or not, is binding on the firm and all the partners.

Partners bound by acts on behalf of firm.

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

7.—Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Partner using credit of firm for private purposes.

8.—If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Effect of notice that firm will not be bound by acts of partner.

9.—Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.

Liability of partners.

10.—Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Liability of the firm for wrongs.

11.—In the following cases; namely—

(a) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and

Misapplication of money or property received for or in custody of the firm.

(b) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss.

12.—Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner there-in becomes liable under either of the two last preceding sections.

Liability for wrongs joint and several.

13.—If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein.

Improper employment of trust-property for partnership purposes.

Provided as follows:—

(1) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and

(2) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

14.—(1) Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made.

Persons liable by "holding out."

(2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executors' or administrators' estate or effects liable for any partnership debts contracted after his death.

Admissions and representations of partners. 15.—An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to acting partner to be notice to the firm. 16.—Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Liabilities of incoming and outgoing partners. 17.—(1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.

(3) A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Revocation of continuing guaranty by change in firm. 18.—A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given.

Relations of Partners to one another.

Variation by consent of terms of partnership. 19.—The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.

Partnership property. 20.—(1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

(2) Provided that the legal estate or interest in any land, or in Scotland the title to and interest in any heritable estate, which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(3) Where co-owners of an estate or interest in any land, or in Scotland of any heritable estate, not being itself partnership property, are partners as to profit made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase.

Property bought with partnership money. 21.—Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

22.—Where land or any heritable interest therein has become partnership property, it shall, unless the contrary intention appears, be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal or moveable and not real or heritable estate.

Conversion into personal estate of land held as partnership property.
Procedure against partner's separate judgment debt.

23.—(1) After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) The High Court, or a judge thereof, or the Chancery Court of the county palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

(4) This section shall apply in the case of a cost-book company as if the company were a partnership within the meaning of this Act.

(5) This section shall not apply to Scotland.

Rules as to interests and duties of partners subject to special agreement.

24.—The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules:

- (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.
- (2) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—
 - (a) In the ordinary and proper conduct of the business of the firm or,
 - (b) In or about anything necessarily done for the preservation of the business or property of the firm.
- (3) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.
- (4) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.
- (5) Every partner may take part in the management of the partnership business.
- (6) No partner shall be entitled to remuneration for acting in the partnership business.
- (7) No person may be introduced as a partner without the consent of all existing partners.
- (8) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.
- (9) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

25.—No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Expulsion of partner.

26.—(1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners.

Retirement from partnership at will.

(2) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

27.—(1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

Where partnership for terms is continued over, continuance on old terms presumed.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

Duty of partners to render accounts, &c.

28.—Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his legal representatives.

29.—(1) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connexion.

Account ability of partners for private profits.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner.

30.—If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business.

Duty of partner not to compete with firm.

31.—(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

Rights of assignee of share in partnership.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

• Dissolution of Partnership, and its consequences.

Dissolution by expiration or notice.

32.—Subject to any agreement between the partners, a partnership is dissolved—

(a) If entered into for a fixed term, by the expiration of that term :

(b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking :

(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or if no date is so mentioned, as from the date of the communication of the notice.

Dissolution by bankruptcy, death, or charge.

33.—(1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under this Act for his separate debt.

34.—A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

Dissolution by illegality of partnership.

35.—On application by a partner the Court may decree a dissolution of the partnership in any of the following cases :

Dissolution by the Court.

- (a) When a partner is found lunatic by inquisition, or in Scotland by cognition or is shown to the satisfaction of the Court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner :
- (b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract :
- (c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business :
- (d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him :
- (e) When the business of the partnership can only be carried on at a loss :
- (f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Rights of persons dealing with firm against apparent members of firm.

36.—(1) Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

(2) An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales, in the Edinburgh Gazette as to a firm whose principal place of business is in Scotland, and in the Dublin Gazette as to a firm whose principal place of business is in Ireland, shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively.

37.—On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence.

Right of partners to notify dissolution.

38.—After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

Continuing authority of partners for purposes of winding up.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt ; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt.

39.—On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may on the termination of the partnership apply to the Court to wind up the business and affairs of the firm.

40.—Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the Court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

- (a) the dissolution is, in the judgment of the Court, wholly or chiefly due to the misconduct of the partner who paid the premium, or
- (b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

41.—Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

- (a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is
- (b) to stand in the place of the creditors of the firm for all payments made by him in respect of the partnership liabilities, and
- (c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

42.—(1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of five per cent. per annum on the amount of his share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

43.—Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

44.—In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed:

- (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.
- (b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:
 1. In paying the debts and liabilities of the firm to persons who are not partners therein;
 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital;
 3. In paying to each partner rateably what is due from the firm to him in respect of capital;
 4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible.

Supplemental.

Definitions "of Court" and "business." 45.--In this Act, unless the contrary intention appears,—

The expression "Court" includes every Court and judge having jurisdiction in the case;

The expression "business" includes every trade, occupation, or profession.

Saving for rules of equity and common law. 46.--The rules of equity and of common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act.

47.--(1) In the application of this Act to Scotland the bankruptcy of a firm or of an individual shall mean sequestration under the Bankruptcy (Scotland) Acts, and also in the case of an individual the issue against him of a decree of cessio bonorum.

(2) Nothing in this Act shall alter the rules of the law of Scotland relating to the bankruptcy of a firm or of the individual partners thereof.

48.--The Acts mentioned in the schedule to this Act are hereby repealed to the extent mentioned in the third column of that schedule.

49.--This Act shall come into operation on the first day of January one thousand eight hundred and ninety-one.

50.--This Act may be cited as the Partnership Act 1890.

SCHEDULE.

Section 18. ENACTMENTS REPEALED.

| Session and Chapter. | Title or Short Title. | Extent of Repeal. |
|------------------------|---|-------------------|
| 19 & 20 Vict. c. 60 .. | The Mercantile Law Amendment (Scotland) Act, 1856 | Section seven. |
| 19 & 20 Vict. c. 97 .. | The Mercantile Law Amendment Act, 1856 | Section four. |
| 28 & 29 Vict. c. 86 .. | An Act to amend the law of partnership | The whole Act. |

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